Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

JIMMY D. MCGUIRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JENNIFER P. BURKES
SCANLON, SESSUMS, PARKER & DALLAS
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, MS 39208
(601) 933-2040

GEORGE COCHRAN
University of Mississippi
RONALD RYCHLAK
Counsel of Record
University of Mississippi
School of Law
University, MS 38677
(601) 232-6801

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

United States v. Gaudin, 515 U.S. 2310 (1995), holds that in a criminal prosecution the issue of materiality must be decided by the jury, not the court. The following questions, undecided by *Gaudin*, are raised in the instant case:

1. Is an instruction that fortuitously mentions the word "material" sufficient to charge the jury with that issue under *Gaudin*?

2. Is a jury instruction that fails to include a definition of materiality sufficient to meet the *Gaudin* standard?

3. What is the proper standard of review to evaluate *Gaudin* error?

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The panel opinion issued by the lower court is reported at 79 F.3d 1396 (5th Cir. 1996) and may be found at App. 18. The *en banc* is reported at 99 F.3d 67 (5th Cir. 1966) and may be found at App. 1. The district court did not issue an opinion.

JURISDICTION

The judgment sought to be reviewed is a judgment of the United States Court of Appeals for the Fifth Circuit entered *en banc* on October 31, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ARTICLE III, SECTION 2, CLAUSE 3, UNITED STATES CONSTITUTION

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Jimmy McGuire, is a practicing lawyer from Gulfport, Mississippi. Suspicious that he was not reporting or paying taxes on cash fee payments, the Internal Revenue Service initiated a "sting" operation. It began with an agent operating under the assumed name of "Florez" contacting him. Accompanied by a second undercover agent ("Martinez"), he met with Petitioner, discussed his "case," and agreed to pay $20,000 toward Petitioner's fee.[1] The next day, the agents returned with yet another undercover agent ("Bolivar"), who handed Petitioner the money.

[1] Throughout, Petitioner insisted that payment could be made by check.

The day after being paid, Petitioner completed and filed a currency transaction report or "CTR."[2] In the section requesting the identity of the person from whom the money was received, Petitioner identified Bolivar. Ten days later,[3] after realizing that he had not identified the beneficiary of the payment, Petitioner filed an amended CTR listing Florez. The result: an amended CTR setting forth the exact amount of money received, the person who did the actual hiring and on whose behalf the money was paid (Florez), and the person who actually gave Petitioner the money (Bolivar).

Unable to prosecute Petitioner for failing to file a CTR or pay taxes, the Government constructed a criminal prosecution based on the amended CTR. To do so, several theories were employed.[4] The first was that the CTR

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contained a material omission in that it did not list Martinez as a beneficiary. This argument was based on the proposition that McGuire had been retained to recover "seized" money[5] and should have known that Martinez was part owner of the amount involved. Later, the government set forth a second theory: even though Bolivar handed Petitioner the payment, the fee was actually "paid" by Florez. Under this approach, the amended CTR had a material misstatement in that it mis-identified Florez as a beneficiary instead of as the person who made the payment, *i.e.*, his name was in the wrong box.

At the time of trial, Fifth Circuit precedent required the issue of materiality to be decided by the judge, not the jury. In accord with this precedent, the judge instructed the jury that it "need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not an issue for the jury to decide." After being found guilty of having filed his CTR with a material misstatement or omission, Petitioner was sentenced to the maximum term of incarceration, three years.

Despite circuit precedent, Petitioner argued on appeal that materiality should have been decided by the jury. The government responded by arguing that the trial judge acted properly in deciding the issue himself. In

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fact, the government suggested that another instruction taking this issue away from the jury could have been given, but any error was harmless since the jury well understood that the materiality issue was not for it to consider.[6]

While the appeal was pending, this Court decided *United States v. Gaudin*, 515 U.S. 2310 (1995). In accordance with that decision, the lower court reversed and remanded Petitioner's case for a new trial. App. 18. While all three members of the panel agreed that error had taken place, they issued three separate opinions on the issue of the proper standard of review. App. 18, 42, 60.

Thereafter, the court issued an order to reconsider the case *en banc*, 90 F.3d 107. Instead of resolving the difficult question of the proper standard of review, however, the majority issued an opinion affirming Petitioner's conviction on grounds contrary to the Government's original argument *and* the panel decision.[7] Specifically, the mere use of the word "material" in an instruction was

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[6] In its original brief to the Fifth Circuit, the government argued that further instruction telling the jury *not* to consider materiality would have been "repetitious." Later, in direct opposition to this position, the government would argue and the *en banc* court would agree that the jury knew it was supposed to consider materiality.

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construed to have been sufficient to meet the requirements of *Gaudin*, even though such an instruction would have been in direct violation of Fifth Circuit precedent at the time.

REASONS FOR GRANTING THE WRIT

A. The Lower Court's Opinion is in Conflict with This Court's Decision in *Gaudin* as Well as Decisions of the First and the Tenth Circuit.

The lower court opinion is but one of a series of decisions by the Fifth Circuit affirming convictions that raise serious *Gaudin* issues.[8] As stated in a dissent below, that court's interpretation of *Gaudin* has been "more consistent with a judicial philosophy that says that the primary role of the Court is to sustain a conviction" than one that says "the primary role of this Court is to see that justice is done." App at 17.

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[8] *See United States v. Upton*, 91 F.3d 677, 686 (5th Cir. 1996) (declining to exercise discretion under plain error review); *United States v. Allen*, 76 F.3d 1348, 1368 (5th Cir.) (finding evidence of materiality overwhelming), *cert. denied*, 117 S.Ct. 121 (1996); *United States v. Jobe*, 101 F.3d 1046 (5th Cir. 1996) (case reheard twice; evidence of materiality found overwhelming); *United States v. Parker*, 1997 WL 11652 at 1 (5th Cir. Jan. 14, 1997) (*en banc*) (rejecting panel's application of harmless error standard and finding no error); *United States v. McGuire*, 99 F.3d 67 (5th Cir. 1996) (*en banc*) (rejecting panel's conclusions and finding materiality inadvertently submitted to jury); *cf. United States v. Pettigrew*, 77 F.3d 1500, 1510 (5th Cir. 1996) (defendant objected to materiality instruction, so plain error was inappropriate).

As described earlier, Petitioner's trial proceeded on the well-settled pre-*Gaudin* assumption that materiality was to be decided by the trial court, not the jury.[9] Not only was the jury given no instruction defining materiality, the sole instruction bearing on the issue told the jurors that:

> If you find that the government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not an issue for the jury to decide.

App. at 3 (emphasis added).[10]

As pointed out in the majority opinion of the three-judge panel: "there is no other instruction on materiality in the charge." App. at 28. Affirming a conviction when the jury was given no definition or guidance on the issue places this case in direct conflict with *Gaudin*.[11] On this basis alone, the case warrants a grant of certiorari.

---

[9] Because of the *Gaudin* error, no evidence of materiality was presented at trial, and the conviction cannot stand. The prosecution had no reason to offer evidence to the jury that the alleged false statements or omissions could have influenced or affected the Internal Revenue Service. Similarly, McGuire was prevented from arguing this issue to the jury. Any attempt to introduce such evidence or make such arguments would have been met with properly sustainable objections based on delay and relevancy. As such, the conviction cannot stand. *See United States v. Baumgardner*, 85 F.3d 1305 (8th Cir. 1996).

[10] This instruction related directly to a court on which Petitioner was acquitted.

[11] The instruction on which the lower court relied due to its mention of the word "material" is set forth at App. 3-4.

Equally critical to a proper disposition of this case is that in *Gaudin*, this Court stated that the "ultimate question" in deciding whether a statement is material "requires applying the legal standard of materiality to these historical facts." 115 S.Ct at 2314. The legal standard to be described was described as follows: "The statement must have a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." 115 S. Ct. at 2313.

In contrast to this clear mandate, the lower court held that the "fortuitous"[12] use of the word "material" was sufficient to cause the jurors to determine its presence or absence, even though they were not given any legal standards defining that word.

The approach taken by the court below is also in direct conflict with the First Circuit decision in *United States v. DiRico*, 78 F.3d 732 (1st Cir. 1996). That case holds that the trial court must "properly instruct the jury on the legal definition of materiality, [and] only the jury can decide whether the facts proved at trial meet the legal standard." *Id.* at 736. Furthermore, determining whether a particular statement is material requires, according to *Gaudin*, "the jury to apply the *legal definition* of materiality to the particular facts of a given case." *Id.* (emphasis added).

The lower court's decision is also in direct conflict with another *en banc* decision, *United States v. Wiles*, 1996 U.S. App. LEXIS 31853 (10th Cir. 1996). In that case, the Tenth Circuit held that "failure to instruct the respective

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[12] App. at 12.

juries on the element of materiality is structural [error] and requires" reversal. *Id.* at *39. Thus, under the Tenth Circuit's interpretation of *Gaudin*, the failure to instruct on materiality requires an appellate court to reverse "even when the evidence . . . is so overwhelming as to establish guilt beyond a reasonable doubt." *Id.* at *41.

The lower court opinion is not only in conflict with *Gaudin*, but also with opinions of the First and Tenth Circuits. This Court should grant certiorari and set the case for argument.

B. The Instant Case Should be Held on the Court's Docket Pending a Decision on the Merits in *United States v. Johnson*, 82 F.3d 429 (11th Cir.), *cert. granted*, 117 S.Ct. 451 (1996).

As reflected by the three separate opinions issued by the original panel, this cases raises the serious issue of the standard of review to be applied in the case of *Gaudin* error. This Court has granted certiorari to resolve the issue. *United States v. Johnson*, 82 F.3d 429 (11th Cir.), *cert. granted*, 117 S.Ct. 451 (1996).[13] At a minimum, this Court should hold the case pending resolution of *Johnson* and subsequently remand for further consideration in light of the direction provided by that case.

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[13] In addition, this Court has before it the case of *United States v. Wells*, 63 F.3d 745 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 1540 (1996) (raising *Gaudin* materiality issues).

CONCLUSION

For these reasons, the Petitioner requests that this Court grant certiorari.

Respectfully submitted this the 28th day of January, 1997.

JIMMY D. MCGUIRE,
Defendant/Petitioner

JENNIFER P. BURKES
SCANLON, SESSUMS, PARKER & DALLAS
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, MS 39208
(601) 933-2040

GEORGE COCHRAN
University of Mississippi

RONALD RYCHLAK
Counsel of Record
University of Mississippi
School of Law
University, MS 38677
(601) 232-7361

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Equally critical to a proper disposition of this case is that in *Gaudin*, this Court stated that the "ultimate question" in deciding whether a statement is material "requires applying the legal standard of materiality to these historical facts." 115 S.Ct at 2314. The legal standard to be described was described as follows: "The statement must have a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." 115 S. Ct. at 2313.

In contrast to this clear mandate, the lower court held that the "fortuitous"[12] use of the word "material" was sufficient to cause the jurors to determine its presence or absence, even though they were not given any legal standards defining that word.

The approach taken by the court below is also in direct conflict with the First Circuit decision in *United States v. DiRico*, 78 F.3d 732 (1st Cir. 1996). That case holds that the trial court must "properly instruct the jury on the legal definition of materiality, [and] only the jury can decide whether the facts proved at trial meet the legal standard." *Id.* at 736. Furthermore, determining whether a particular statement is material requires, according to *Gaudin*, "the jury to apply the *legal definition* of materiality to the particular facts of a given case." *Id.* (emphasis added).

The lower court's decision is also in direct conflict with another *en banc* decision, *United States v. Wiles*, 1996 U.S. App. LEXIS 31853 (10th Cir. 1996). In that case, the Tenth Circuit held that "failure to instruct the respective

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[12] App. at 12.

juries on the element of materiality is structural [error] and requires" reversal. *Id.* at *39. Thus, under the Tenth Circuit's interpretation of *Gaudin*, the failure to instruct on materiality requires an appellate court to reverse "even when the evidence . . . is so overwhelming as to establish guilt beyond a reasonable doubt." *Id.* at *41.

The lower court opinion is not only in conflict with *Gaudin*, but also with opinions of the First and Tenth Circuits. This Court should grant certiorari and set the case for argument.

B. The Instant Case Should be Held on the Court's Docket Pending a Decision on the Merits in *United States v. Johnson*, 82 F.3d 429 (11th Cir.), *cert. granted*, 117 S.Ct. 451 (1996).

As reflected by the three separate opinions issued by the original panel, this cases raises the serious issue of the standard of review to be applied in the case of *Gaudin* error. This Court has granted certiorari to resolve the issue. *United States v. Johnson*, 82 F.3d 429 (11th Cir.), *cert. granted*, 117 S.Ct. 451 (1996).[13] At a minimum, this Court should hold the case pending resolution of *Johnson* and subsequently remand for further consideration in light of the direction provided by that case.

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[13] In addition, this Court has before it the case of *United States v. Wells*, 63 F.3d 745 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 1540 (1996) (raising *Gaudin* materiality issues).

CONCLUSION

For these reasons, the Petitioner requests that this Court grant certiorari.

Respectfully submitted this the 28th day of January, 1997.

JIMMY D. MCGUIRE,
Defendant/Petitioner

JENNIFER P. BURKES
SCANLON, SESSUMS, PARKER & DALLAS
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, MS 39208
(601) 933-2040

GEORGE COCHRAN
University of Mississippi

RONALD RYCHLAK
Counsel of Record
University of Mississippi
School of Law
University, MS 38677
(601) 232-7361

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60648

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMY D. MCGUIRE,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Mississippi

(Filed Oct. 31, 1996)

Before POLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

We took this case en banc to consider the difficult problems attending application of *United States v. Gaudin*, 115 S. Ct. 2310 (1995), which held that materiality is a question for the jury, not the court. With the benefit of additional briefing and oral argument before the en banc court, we are now persuaded that the district court did not withhold the element of materiality from the jury on the count on which defendant McGuire was convicted.

See Victor v. Nebraska, 114 S. Ct. 1239, 1243 (1994) ("proper inquiry is not whether the instruction could have been applied in unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it.") (emphasis in text).[1] It is clear that Instruction 20, pertaining to a count upon which McGuire was *acquitted*, incorrectly removed the issue of materiality from the jury. Instruction 36, however, which specified the elements of the only count for which McGuire was convicted, did not do so. Finding no ***Gaudin*** error or other reversible error, we affirm the judgment of conviction.

AFFIRMED.

APPENDIX

INSTRUCTION NO. 15

A separate crime is charged in each count of the indictment. Each count and the evidence pertaining to it should be considered separately and each element must be proved beyond a reasonable doubt. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other of the crimes charged.

* * *

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[1] The dissent continues to adhere to the view that the instructions took the issue of materiality away from the jury with respect to McGuire's violation of 26 U.S.C. § 6050I. The instructions speak for themselves. We include the relevant portions of the jury charge in an appendix.

INSTRUCTION NO. 20

Title 26, United States Code, Section 7206(1), as charged in Count 5 of the indictment in Criminal No. 1:93cr35BrR, makes it a crime for anyone willfully to make a false statement on an income tax return. "Willfully" means with intent to violate a known legal duty.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant signed an income tax return that contained a written declaration that it was made under penalties of perjury;

Second: That in this return the defendant falsely stated the amount of gross receipts on the Schedule C for his law practice during 1988;

Third: That the defendant knew the statement was false; and

Fourth: That the defendant made the statement on purpose, and not as a result of accident, negligence or inadvertence.

If you find that the government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

* * *

INSTRUCTION NO. 36

Count 4 of the indictment charges the defendant with a violation of 26 U.S.C. § 6050I(f)(1)(B). The statute provides in pertinent part that:

> No person shall for the purpose of evading the return requirement of this section –
>
> > (B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact.

The essential elements that must be proved under that section are:

FIRST, that the defendant knew of a trade or business's duty to report currency transactions in excess of $10,000;

SECOND that with such knowledge, the defendant knowingly and willfully caused or attempted to cause a trade or business to file a report required under this section [an 8300 form] that contained a material omission or misstatement of fact; and

THIRD, that the purpose of the material omission or misstatement of fact was to evade the transaction reporting requirement.

In this case the trade or business alleged in the indictment is the defendant's law practice. You may find the defendant guilty of violating § 6050I(f) whether or not the trade or business filed, or failed to file, a true and accurate 8300 form. In other words, if you find beyond a reasonable doubt that the defendant caused or attempted to cause a trade or business to file a return that contained a material omission or misstatement of fact, and that he did so for the purpose of evading the transaction report requirements, then you should find the defendant guilty as charged as to this count. If you do not so find, then you should find the defendant not guilty.

DeMOSS, Circuit Judge, dissenting:[1]

In *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328. Embracing a view previously expressed by Justice Harlan, the Court stated that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322.

Such a new rule was announced by the Supreme Court on June 19, 1995, in *United States v. Gaudin*, ___ U.S. ___, 115 S. Ct. 2310, 2320, 132 L.Ed.2d 444 (1995), wherein the Court held that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality, of Gaudin's false statements infringed that right." At the time the Supreme Court decided *Gaudin*, McGuire's appeal to this Court was awaiting oral argument and both sides filed supplemental briefs addressing the applicability of the Gaudin decision to this case. Clearly, therefore, under *Griffith*, McGuire was entitled to claim

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[1] Judge Wiener and Judge Dennis join in the entirety of this dissent. Judge Smith joins in all but the last four paragraphs of this dissent but would affirm the conviction on the basis of harmless error.

whatever benefits the new rule in ***Gaudin*** made applicable to his case.

Obviously, if materiality is an element of the crime which must be submitted to the jury under ***Gaudin***, then the next corollary question is how the materiality element should be submitted to the jury. The question of a proper jury instruction was, of course, not present in ***Gaudin*** because the trial court in ***Gaudin*** had simply instructed the jury that the issue of materiality was not a matter for the jury to decide. But in its analysis of why the issue of materiality was one which had to be decided by the jury, the Supreme Court made several comments relevant to determining the manner in which materiality should be submitted to the jury. The Supreme Court stated:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?"; and (b) "what decision was the agency trying to make?". The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts.

Id. at 2314. Earlier in its opinion, the Supreme Court favorably quoted the definition of "materiality" which the parties had recognized in that case:

> [T]he statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." ***Kungys v. United States***, 485 U.S. 759, 770, 108 S. Ct. 1537, 1546, 99 L.Ed.2d 839 (1988).

Id. at 2313. While the criminal statute involved in *Gaudin* was 18 U.S.C. § 1001 (falsifying a material fact concerning a matter within the jurisdiction of a government agency), the same analysis should be applicable to the criminal statutes involved here in McGuire: 26 U.S.C. § 7206(1) (willfully drafting an income tax return which is not true and correct as to every material matter) and 26 U.S.C. § 6050I(f)(B) (causing a business to file a return regarding cash receipts over $10,000 which contains a material omission or mis-statement of fact).[2] Both of these returns

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[2] The indictment under which McGuire was convicted contained the following counts, and the jury's verdict to each of these counts is as indicated:

> Count 1: Conspiracy from August 1989 to December 1992 between McGuire and other individuals "both known and unknown to the Grand Jury" to defraud the United States by impeding, obstructing and defeating the functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of revenue: to-wit income taxes. In violation of 18 U.S.C. § 371.
>
> NOT GUILTY.
>
> Count 2: Between February 5, 1992 and continuing through February 19, 1992, McGuire did knowingly conduct and attempt to conduct a financial transaction affecting interstate commerce, that is defendant deposited $20,000 in United States currency into a bank account at Hancock Bank, Gulfport, Mississippi, such $20,000 having been represented by a special agent acting in an undercover capacity, to be the proceeds of an unlawful activity. In violation of § 1956(a)(3) (B) and (C) of Title 18.
>
> NOT GUILTY.

were filed with the Internal Revenue Service which is clearly a government agency charged with making a variety of decisions on the basis of the information reported in each of these returns. So applying the reasoning and analysis of ***Gaudin*** as to the manner and form in which the issue of materiality under each of these statutes should be submitted to the jury would require the following:

a. Was there an omission or misstatement of fact in the return in question;

> Count 3: Forfeiture of the $20,000 described in Count 2 which was represented to the defendant to be proceeds of cocaine trafficking pursuant to § 982, Title 18, and § 853, Title 21.
>
> NO JURY ANSWER REQUIRED.
>
> Count 4: In February 1992 McGuire did knowingly and willfully cause his law practice to file an IRS form 8300 in connection with a transaction involving the receipt of $20,000 of U.S. currency which contained material omissions or misstatements of fact. All in violation of §§ 6051I(f)(1)(B) and 7206(1) of Title 26.
>
> GUILTY.
>
> Count 5: On January 27, 1989, McGuire made and subscribed an individual tax return for the calendar year 1988 which was filed with the IRS on August 1, 1989, which tax return he did not believe to be true and correct as to every material matter in the return. In violation of § 7206(1) of Title 26.
>
> NOT GUILTY.

Note that count 2, § 1956(a)(3) (B) and (C), money laundering, related to the very same $20,000 which the undercover agents delivered to McGuire as a retainer for his legal services and the jury found McGuire not guilty on this count. Secondly, note that the indictment states that count 4 is in violation of both § 6050I(f) (1) (B) and § 7206(1).

b. Was that omission or misstatement of fact material; and

c. A definition of "material" as being a matter which "would have a natural tendency to influence or be capable of influencing the decision of the decision making body to which it was addressed, i.e. the Internal Revenue Service.[3]

Now the government contends that Instruction No. 36, which was submitted as to count 4 of the indictment charging a violation under § 6050I(f) (1) (B), properly submitted the element of materiality to the jury. Regretfully, a majority of my colleagues at the en banc hearing have inferentially bought this contention. Insofar as a statement of the elements of the crime are concerned, Instruction 36 states:

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[3] Since the Supreme Court decision in *Gaudin*, the Ninth Circuit has published a new form in its model jury instructions for use in counts relating to 18 U.S.C. § 1001 (false statement to government agency) which states in relevant part as follows:

> In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant [made a false statement] [used a writing which contained a false statement] in a matter within the jurisdiction of the [e.g. United States Customs Service];
>
> Second, the defendant acted willfully, that is deliberately and with knowledge that the statement was untrue; and
>
> Third, the statement was material to the _____'s activities or decisions.
>
> A statement is material if it could have influenced the agency's decisions or activities.

> The essential elements that must be proved under that section are:
>
> FIRST, that the defendant knew of a trade or business's duty to report currency transactions in excess of $10,000;
>
> SECOND, that with such knowledge the defendant knowingly and willfully caused or attempted to cause a trade or business to file a report required under this section [an 8300 form] that contained a material omission or misstatement of fact; and
>
> THIRD, that the purpose of the material omission or misstatement of fact was to evade the transaction reporting requirement.

This submission is defective for the following reasons:

a. It does not separately require the jury to determine that there was both an omission or misstatement of fact and that such omission or misstatement of fact was material; and

b. It does not give a definition of "materiality" which would require the jury to address whether the omission or misstatement of fact had a natural tendency to influence or was capable of influencing the decision of the IRS. Nowhere else in the Court's charge was there a definition of "materiality". However, in the Court's charge under Instruction 20 regarding count 5 which charged violation of § 7206(1), there was the following paragraph:

> If you find that the government has proved these things you need not consider whether the false statement was a material false statement,

> even though that language is used in the indictment. This is not a question for the jury to decide.

This concluding paragraph was taken verbatim from the Fifth Circuit Pattern Jury Instructions Manual (1990 edition) and reflects the prevailing practice, which existed in this Circuit prior to the Supreme Court's decision in ***Gaudin***, that materiality was not an issue for the jury. This manual proposes that this same paragraph be used as part of the pattern jury instructions in indictments charging violations under the following statutory provisions:

> (a) false claim against the government, 18 U.S.C. § 287;
>
> (b) false statements to firearm dealers, 18 U.S.C. § 922(a)(6);
>
> (c) false statement to federal agencies and agents, 18 U.S.C. § 1001;
>
> (d) false statements in bank records, 18 U.S.C. § 1805 – ¶ 3;
>
> (e) false statements to a bank, 18 U.S.C. § 1014;
>
> (f) false statements before grand jury, 18 U.S.C. § 1623;
>
> (g) false statements on income tax return, 26 U.S.C. § 7206(1); and
>
> (h) aiding and preparation of false documents under the Internal Revenue laws, 26 U.S.C. § 7206(2).

Furthermore, the 1990 edition of Fifth Circuit Pattern Jury Instructions does not contain any definition of the word

"material" nor is there a pattern jury instruction for indictments brought under 26 U.S.C. § 6050I. The Fifth Circuit Pattern Jury Instruction manual is replete with comments and cites cases indicating that materiality is a matter for decision by the court and not by the jury. There is no pattern jury instruction in the Fifth Circuit manual indicating the proper way that materiality should be submitted as an issue to the jury under any other statutory provision.

Against this background of regular, consistent and routine withdrawal of the issue of materiality from the jury, the government now has the temerity to contend that, by some fortuitous circumstance, a rational decision was made in McGuire's trial to include the element of materiality for submission to the jury in Instruction No. 36 on count 4. Anyone who has read the record in this case will find that contention unsupportable. Surely if it was the rational intention of the court and opposing counsel to submit count 4 to the jury for a materiality determination and count 5 without a determination of materiality by the jury, somewhere, somehow, the difference in the jury's responsibility under these two counts would have been emphasized and brought to the jury's specific attention, hopefully in writing, but if not, certainly through oral instructions. Yet nowhere in this record nor in the jury argument of either counsel was that distinction made; and, more convincingly, nowhere in the argument of either counsel was the subject of "materiality" discussed at all.

Furthermore, at the time of trial, there was no Fifth Circuit case which could have been cited for the proposition that the element of materiality found in § 6050I

requires submission of the materiality element to the jury. But, if the Supreme Court's decision in ***Gaudin*** had been lying on the table when the district court and opposing counsel prepared the jury charge in ***McGuire***, surely the format for instructions relating to the submission of count 4, § 6050I, and count 5, § 7206, would have been different from the instructions as actually submitted; and if ***Griffith*** means anything at all, it means that McGuire is now entitled to have the benefit of the new rules about materiality announced by ***Gaudin*** applied in determining the propriety of the instruction on count 4.

Some of my colleagues have reasoned that if there was error in the manner in which materiality was submitted to the jury as to count 4, such error was "harmless" or that the concept of "materiality" is a common everyday term for which the jury does not need a definition. In my view, such reasoning seriously undermines the impact of the decision in ***Gaudin*** to require the element of materiality to be submitted to the jury in criminal prosecutions. In my view, ***Gaudin***'s requirement that materiality be tested by a finding that the false information be capable of influencing a decision of the government agency to which the form is addressed, has a significant and beneficial purpose in protecting the rights of citizens from government intrusions, which this case would so clearly demonstrate if tried under ***Gaudin***'s new rule. In such event, all of the circumstances involved in count 4 grew out of a sting operation initiated by the government. The Internal Revenue Service had received information from various sources indicating that McGuire was receiving large amounts of cash as fees for his legal services and was not reporting those amounts of cash in either his

income tax returns or under the report form required by § 6050I. As a result, McGuire became the target of an undercover sting operation in which Government Agent Narciso Hernandez posed as Hector Flores, Government Agent Henry Montes posed as Hector Martinez, and Government Agent David Barrientos posed as David Bolivar. Bolivar contacted McGuire with a fictional story that they wanted to hire McGuire to represent them in avoiding forfeiture of some $280,000 in cash which had been seized during a traffic stop by the Mississippi Highway Patrol. During their discussions with McGuire, a retainer of $20,000 cash was agreed upon and, after some delay to get the cash together, they presented that sum to McGuire as a partial payment on his fee. The following day McGuire prepared IRS form 8300 reporting the receipt of $20,000 cash. Part I of this form, which required the identity of the "individual from whom cash was received," was filled in with the name "David Bolivar," the fictitious name used by Agent Barientos and the fictitious address and driver's license and social security number furnished by Agent Barientos. Part II of this form which required the identity of the "person on whose behalf the transaction was conducted" was left blank. Ten days later, McGuire filed an amended form 8300. Part I of the amended form again listed "Bolivar" as the payor but disclosed in Part II that "Hector Flores," the fictitious name used by Agent Hernandez, was the person on whose behalf David Bolivar paid the $20,000. Neither form used the name of Martinez, which was the fictitious name under which Agent Montez was operating. Obviously, had McGuire not filed a form 8300 at all or if McGuire had reported the receipt of only $10,000 rather

than $20,000 as actually paid to him, the sting operation would have been successful in demonstrating that McGuire was not reporting at all or was inaccurately reporting the sums received by him in cash as attorney's fees. But neither of those circumstances occurred in this case. A very legitimate question arises as to the materiality of any of the rest of the information on the form 8300 because the government certainly knew that this was a sting operation and that Bolivar, Flores and Martinez were not real people. Consequently, even if the government should argue that one of the purposes of form 8300 is to permit them to identify individuals who are using large sums of cash in business transactions, the information as to the "individual from whom cash was received" and "the individual on whose behalf the transaction was conducted" would be of no real value on the forms filed by McGuire because the government knew those were fictitious individuals. Surely the government could not contend that McGuire could be liable for using the fictitious names given him by the government agents in the sting operation. Likewise, the government would have no reason to pass on to any other government agency the fictitious names used by the agents in the sting operation as individuals who were likely transacting business with large sums of cash. In short, McGuire, the target of this sting operation, filed a form 8300 and later filed an amended form 8300 which correctly reported his receipt of the correct sum of money paid to him. The rest of the information on these forms would not produce any decision or action by the Internal Revenue Service and a reasonable jury could conclude that any omission or misstatement in the rest of these forms

was not material to the Internal Revenue Service. All of which emphasizes the importance of the jury being properly instructed as to the definition of materiality and then being permitted to decide the ultimate mixed question of fact and law which *Gaudin* so clearly says is the jury's ultimate decision.

Finally, I must register my dissent from the enigmatic per curiam opinion which the majority has filed in this case. If, as the majority seems to recognize, *Gaudin* held that materiality is a question for the jury, then the corollary to that basic rule is that the issue of materiality must be properly submitted to the jury. The majority states that the district court did not withhold the element of materiality from the jury but that does not address the issue of whether materiality was properly submitted. If the element of materiality is improperly submitted to the jury that is just as incorrect as not submitting it at all. As discussed earlier, there are genuine and serious defects with the way the district court submitted the elements of § 6050I in Instruction 36. But if the majority genuinely believes that the way the district court submitted the issue of materiality in Instruction 36 is correct and proper, then they should clearly so hold, and that format can then become the established precedent for this Circuit and the basis upon which a pattern jury instruction could be developed regarding submission of the issue of materiality.

Likewise, a majority holding that Instruction 36 was a proper submission of the materiality issue to the jury would give McGuire a clear issue upon which to seek a writ of certiorari from the Supreme Court. Interpreting *Gaudin* as defining error only to the extent that the

district court expressly withholds materiality from the jury's determination is a stingy and hyper-technical interpretation which is more consistent with a judicial philosophy that says that the primary role of this Court is to sustain a conviction. Rather, we should be governed by a judicial philosophy that says that the primary role of this Court is to see that justice is done in each individual case. When the Supreme Court announces a fundamental change in the law to the extent involved in ***Gaudin***, and when the Supreme Court has set an established policy that such changes in the law shall be applied to cases pending on appeal as it has done in ***Griffith***, then a philosophy of dispensing justice in an individual case will be better served by giving the defendant the benefit of a retrial at which the district court, the prosecutor and defense counsel can all give full consideration to the change of law involved.

CONCLUSION

Essentially, McGuire's case was tried on the wrong premise, i.e., that materiality was not a question for the jury. Inadvertently, McGuire's count of conviction was submitted to the jury *without* the standard language for withdrawing the materiality issue from the jury contained in every pattern jury instruction in the Fifth Circuit. As submitted, the definition of the elements of § 6050I failed to require a separate determination of materiality as an element of the crime and failed to define the concept of materiality itself. This conviction should be reversed and remanded for a new trial where the element of materiality could be properly submitted to the jury as required by ***Gaudin***.

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79 F.3d 1396, U.S. v. McGuire, (C.A.5 (Miss.) 1996)

77 A.F.T.R.2d 96-1677

UNITED STATES of America, Plaintiff-Appellee,

v.

Jimmy D. McGUIRE, Defendant-Appellant.

No. 94-60648.
United States Court of Appeals,
Fifth Circuit.
March 26, 1996.

Jennifer Parkinson, Burkes, Jackson, MS, William Liston, William Liston, III, Winona, MS for appellant.

Ruth Morgan, Victoria May, Asst. U.S. Attys., George Phillips, U.S. Atty., Biloxi, MS, James B. Tucker, Asst. U.S. Atty., Jackson, MS, for appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before SMITH, WIENER and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Jimmy D. McGuire, a Mississippi attorney, was convicted by jury in the Southern District of Mississippi of filing a false IRS form 8300 in violation of 26 U.S.C. § 6050I(f)(1)(B) and 26 U.S.C. § 7206(1).[1] McGuire was

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[1] Title 26 U.S.C. § 6050I requires that cash receipts of more than $10,000 per transaction (or set of related transactions) be reported. Section 6050I(f)(1)(B) provides in relevant part:

"No person shall for the purpose of evading the return requirements of this section . . . (B) cause or attempt to cause a

sentenced to 36 months incarceration to be followed by one-year supervised release. McGuire was also fined $50,000, ordered to pay $20,000 for cost of confinement and ordered to pay a $50 special assessment.

McGuire appeals his conviction, the district court's order denying his post-trial motions for acquittal or new trial and the sentencing order. On appeal McGuire claims that the jury instructions were deficient, the evidence was insufficient and that he was unduly prejudiced by the prosecutors' improper remarks in closing argument. During the pendency of this appeal, the Supreme Court decided *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). We are persuaded that *Gaudin* renders the jury instructions given in this case reversible error. McGuire's conviction will be reversed and the case remanded for possible retrial.

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trade or business to file a return required under this section that contains a material omission or misstatement of fact. . . . "

The criminal penalties applicable for violation of § 6050I(f)(1) are the same as those provided for failing to file or filing a false return. 26 U.S.C. § 6050I(f)(2).

Title 26 U.S.C. § 7206(1) provides that any person who "willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter" can be fined up to $100,000 and sentenced to three years or both.

BACKGROUND

Jimmy D. McGuire is an attorney licensed in the state of Mississippi. In February 1982, McGuire had a substantial criminal defense practice representing individuals charged with drug offenses, as well as other matters. Around that time, the IRS received information from a number of sources suggesting that McGuire routinely received and failed to report large amounts of cash in his practice, which he then laundered in various transactions for the purchase of expensive automobiles and real estate.[2] As a result, McGuire became the target of an undercover "sting" operation. Three government agents were involved in the sting that resulted in McGuire's conviction: (1) agent Narciso Hernandez, posing as Hector Flores (Flores); (2) agent Henry Montes, posing as Hector Martinez (Martinez); and (3) agent David Barrientos, posing as David Bolivar (Bolivar).[3]

Flores contacted McGuire by telephone on February 5, 1992, with the story that $280,000 had been seized from Flores' car during a traffic stop by the Mississippi Highway Patrol. Flores requested McGuire's assistance in recovering the money and avoiding forfeiture. Later that day Flores and another agent, Martinez, met with

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[2] The information generating the investigation was well-documented at trial. Several ex-clients testified that McGuire routinely required large cash payments in the tens of thousands of dollars and refused to give receipts. Other individuals offered testimony about large amounts of cash observed in McGuire's home and about large purchases made with cash.

[3] To avoid confusion, the opinion refers to the agents using their aliases.

McGuire in his Gulfport office. During the meeting, Flores explained that it would be hard to come up with a legitimate source for the $280,000, to which McGuire responded: "You don't have to be a genius. Ah, did you win the lottery in Florida? Did you, ah – did it belong to someone else?" Flores informed McGuire that he was a cocaine dealer, stating "I've just been selling a little bit of cocaine, that's about it." McGuire suggested that Flores could more successfully evade law enforcement by flying or by driving Highway 90 and Highway 26 as an alternative to Interstate 10, because "[t]hey don't patrol that area at all."

Flores said that he had told police that the money was from a sale of floor tile, but confessed to McGuire that this was not true. Nonetheless, when Martinez asked whether it would be a good idea to have a contractor claim to have received tile, McGuire replied that it would. McGuire advised Flores and Martinez that it would back up their claim if they filed a form with the IRS reporting that they had received the $280,000 from the sale of tile, but that it would be inadvisable to file the form if the money was illegal, because filing a false form is also a crime.

Martinez explained that he had not been present at the stop and seizure, but that he had a partial interest in the $280,000. McGuire agreed to represent both Flores and Martinez in their effort to recover the money and proposed a $20,000 retainer, plus an agreement for 30% of whatever was recovered. Martinez asked whether McGuire would have to file a form with the IRS if Martinez paid McGuire the $20,000 retainer in cash. Both Flores and Martinez expressed concern about having

their name appear on any forms. The three men then discussed at length different methods for evading the filing requirement established by 26 U.S.C. § 6050I.

McGuire proposed that Flores and Martinez bring in a third party, who could hand the money to McGuire. McGuire said he could then set up a dummy file for representation of that third party and, if anyone asked, McGuire could say that the arrangement for representation of Flores and Martinez was strictly on a contingent fee basis. McGuire explained, "you will be my client, but that money won't be connected to it."[4]

The next morning, February 6, Flores telephoned McGuire, explaining that he was trying to secure money for McGuire's retainer. Later that day, Flores and Martinez went back to McGuire's office, this time with a third agent who posed as David Bolivar. McGuire again agreed to represent Flores and Martinez in the forfeiture action. Flores "agreed to pay McGuire $20,000 as partial payment of the fee." Then the following exchange occurred:

> Flores: We thought about what you said yesterday. We'll just go ahead and give you the 20,000.
>
> McGuire: Okay.
>
> Flores: And, then, if you need to put somebody's name or something, you can put his name on it.
>
> McGuire: Okay.

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[4] McGuire also suggested keeping the initial retainer just under the statutory $10,000 amount and structuring the transaction through different banks with cashiers' checks drawn for less than $10,000.

McGuire inquired whether Bolivar had the money, to which Flores replied, "I got it here." McGuire admonished Flores to "[p]ut that away. It should not come from you." Sounding exasperated, McGuire added "I'm gonna walk out of the room for just a second, okay?" As McGuire left, Flores directed McGuire's attention to Bolivar and said "[j]ust give it to him?" McGuire responded by throwing up his hands and leaving the room.

When McGuire returned, Bolivar gave McGuire $20,000 in cash. Both Bolivar and Flores requested a receipt. Bolivar told McGuire he would say that they had a percentage fee arrangement, if anyone asked. McGuire confirmed the arrangement and agreed that they did not have to tell anyone about the $20,000. Flores informed McGuire that the bills were all in hundreds, and that the money was packaged one thousand dollars to a bundle. Martinez again expressed concern about whether his name would appear on any documents, but instructed McGuire to "get what we want."

The following day, February 7, McGuire prepared IRS form 8300, reporting the receipt of $20,000 cash. Part I of the form identified David Bolivar as the "individual from whom cash was received." Part II, which required the identity of the "person . . . on whose behalf this transaction was conducted," was left blank. Ten days later, on February 17, McGuire filed an amended form 8300. Part I of the amended form again listed Bolivar as the payor, but disclosed in Part II that Hector Flores was the person on whose behalf David Bolivar paid the $20,000. Neither form disclosed Martinez' identity.

McGuire was indicted in two separate indictments on charges of conspiracy, money laundering, filing a false income tax return and filing a false IRS form 8300. He was acquitted on all counts except count four, the count relating to the 8300 forms filed after the sting operation. With the regard to the first 8300 form, the indictment alleged McGuire "falsely stated the identity of the individual from whom the cash was actually received and failed to disclose the person on whose behalf the transaction was conducted." With regard to the second 8300 form, the indictment alleged McGuire "falsely stated the identity of the individual from whom the cash was actually received." McGuire appeals his conviction on count four, the district court's order denying his post-trial motion for acquittal or new trial and the district court's sentencing order.

JURY INSTRUCTIONS

McGuire was convicted of violating 26 U.S.C. § 6050I(f)(1)(B) in conjunction with 26 U.S.C. § 7206(1). Title 26 § 6050I(f)(1)(B) requires proof that a defendant (1) for the purpose of evading the § 6050I reporting requirement; (2) caused or attempted to cause a trade or business to file a § 6050I return; (3) containing a *material omission or misstatement of fact*. 26 U.S.C. § 6050I (Supp.1995) (emphasis added). Title 26 U.S.C. § 7206(1) requires proof that a defendant: (1) willfully; (2) made and subscribed a return, statement or other document; (3) containing or verified by a written declaration that it was made under penalties of perjury; and (4) that the defendant did not believe that document to be true and correct as to *every material matter* (emphasis added). *United States v. McCord*,

33 F.3d 1434, 1450 (5th Cir.1994), *cert. denied sub nom., Haley v. United States*, ___ U.S. ___, 115 S.Ct. 2558, 132 L.Ed.2d 812 (1995).

McGuire's jury received 38 separate instructions. Many of those instructions applied generally to all counts, while others were specific to the counts charged. Instruction 36, the only instruction specific to the count of conviction, required that the jury find that: (1) McGuire knew that the law practice had a duty to report currency transactions in excess of $10,000; (2) McGuire knowingly and willfully caused or attempted to cause the filing of a form 8300 containing a material omission or misstatement of fact; and that McGuire so acted (3) for the purpose of evading the reporting requirement. Instruction 20, which was specific to a separate § 7206(1) violation involving conduct unrelated to the sting operation, instructed the jury, in relevant part, as follows:

> If you find that the government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

I. Failure to Instruct on Materiality

"The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, ___ U.S. ___, ___, 115 S.Ct. 2310, 2314, 132 L.Ed.2d 444 (1995). McGuire first contends that he was deprived of this right because the district court removed the issue of materiality, an essential element of both the

§ 6050I reporting requirement and the § 7206(1) criminal enforcement provision, from the jury's consideration. We agree.

McGuire was convicted in May 1994. In May 1994, the well-settled law in the overwhelming majority of our federal circuits, including our own, considered the materiality of false statements made the subject of criminal prosecution to be a question of law for the court. *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir.1990), *cert. denied*, 502 U.S. 952, 112 S.Ct. 405, 116 L.Ed.2d 354 (1991); *United States v. Corsino*, 812 F.2d 26, 31 n. 3 (1st Cir.1987); *United States v. Brantley*, 786 F.2d 1322, 1327 & n. 2 (7th Cir.), *cert. denied*, 477 U.S. 908, 106 S.Ct. 3284, 91 L.Ed.2d 572 (1986); *United States v. Hansen*, 772 F.2d 940, 950 (D.C.Cir.1985), *cert. denied*, 475 U.S. 1045, 106 S.Ct. 1262, 89 L.Ed.2d 571 (1986); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988, 106 S.Ct. 396, 88 L.Ed.2d 348 (1985); *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362, 367 (4th Cir.), *cert. denied*, 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985); *United States v. Swaim*, 757 F.2d 1530, 1534 (5th Cir.), *cert. denied*, 474 U.S. 825, 106 S.Ct. 81, 88 L.Ed.2d 66 (1985); *United States v. Chandler*, 752 F.2d 1148, 1150-51 (6th Cir.1985); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43 (1984); *United States v. Lopez*, 728 F.2d 1359, 1362 n. 4 (11th Cir.), *cert. denied*, 469 U.S. 828, 105 S.Ct. 112, 83 L.Ed.2d 56 (1984); *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir.1980). The Ninth Circuit considered the issue of materiality to be a question of law for most purposes, but recognized an exception for prosecutions involving 18 U.S.C. § 1001. *See United States v. Flake*, 746 F.2d 535, 537-38 (9th Cir.1984), *cert. denied*, 469 U.S. 1225,

105 S.Ct. 1220, 84 L.Ed.2d 360 (1985); *United States v. Valdez*, 594 F.2d 725, 728-29 (9th Cir.1979); *see also United States v. Gaudin*, 28 F.3d 943, 946 (9th Cir.1994) (en banc), *affd.*, ___ U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

Shortly after McGuire's conviction, the Ninth Circuit, sitting en banc in *Gaudin*, turned the exception into the rule. *Id.* Gaudin was convicted on 43 counts of making false statements on loan documents in violation of 18 U.S.C. § 1001. *Id.* at 944. The Ninth Circuit reversed Gaudin's conviction based on the district court's failure to submit the issue of materiality to the jury. *Id.* On subsequent rehearing en banc, the Ninth Circuit affirmed the panel decision, holding broadly that materiality is "in most situations . . . a mixed question of law and fact," that must be submitted to the jury. *Id.* at 948-49 ("Only if it can be said that there is no factual component to the determination of materiality and thus, that it is a pure question of law, would the Sixth Amendment constraint not apply.").

The Ninth Circuit's decision in *Gaudin* was quickly affirmed by the Supreme Court. ___ U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). When materiality is an essential element in a criminal prosecution, the defendant has a constitutional right to have that issue submitted to the jury. *Id.* at ___, ___, 115 S.Ct. at 2314, 2320. There is no historical, logical or precedential exception to the Sixth Amendment jury right for criminal prosecutions for false statement or perjury. *Id.* at ___-___, 115 S.Ct. at 2316-19. *Gaudin*'s requirement that materiality be submitted to the jury has been applied to require submission of that element in prosecutions involving other federal statutes. *E.g., United States v. Keys*, 67 F.3d 801 (9th Cir.1995) (18

U.S.C. § 1623); *United States v. DiRico*, No. 94-1471, 1995 WL 646259 (1st Cir. Nov. 3, 1995) (unpublished) (26 U.S.C. § 7206(1)); *United States v. Wells*, 63 F.3d 745 (8th Cir.1995) (18 U.S.C. § 1014).

Because *Gaudin* was decided while McGuire's direct appeal was pending, he is entitled to invoke the rule of that case as controlling. *Griffith v. Kentucky*, 479 U.S. 314, 327-28, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987); *United States v. Oreira*, 29 F.3d 185, 188 (5th Cir.1994). McGuire's jury was instructed that it must find that the form 8300 contained a material omission or misstatement of fact (instruction 36), but the jury was further instructed that, even though the indictment required materiality, the issue was "not a question for the jury to decide" (instruction 20).[5] Gaudin's jury was likewise instructed that, while the offense required the false statements to be material, materiality was not a question for the jury. *Gaudin*, ___ U.S. at ___, 115 S.Ct. at 2313. *Gaudin* makes it error for the district court to fail to submit the issue of materiality to the jury. *See Oreira*, 29 F.3d at 188.

Not surprisingly, McGuire failed to object at trial to the district court's instruction which removed the issue of materiality from the jury. Indeed, to have done so would have required prescience on McGuire's part and would have been futile in light of well-established precedent,

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[5] Although instruction 20 related specifically to count 5, there is no other instruction on materiality in the charge. We evaluate the sufficiency of the jury instructions with reference to the entire charge. *United States v. Welch*, 810 F.2d 485, 487 (5th Cir.), *cert. denied*, 484 U.S. 955, 108 S.Ct. 350, 98 L.Ed.2d 376 (1987).

not only in this Circuit, but in every other federal circuit that had examined the issue, including the Ninth.[6] Nonetheless, McGuire's failure to preserve error at trial requires that we review his claim for plain error only. FED.R.CRIM.P. 52(b).

II. Plain Error Analysis

We are convinced that the error in McGuire's case meets even the lofty plain error standard. Under Federal Rule of Criminal Procedure 52(b), the court may review "[p]lain errors and defects affecting substantial rights . . . although they were not brought to the attention of the court." In *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the Supreme Court construed rule 52(b) to require a showing that (1) there was error and no waiver; (2) the error was plain; and (3) that the error affected the defendant's substantial rights. *Id.* at 730-31, 113 S.Ct. at 1776. Provided the three elements are satisfied, the reviewing court has discretion to correct the otherwise forfeited error when the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotations omitted).

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[6] At the time of McGuire's trial, the Ninth Circuit exception for prosecutions involving 18 U.S.C. § 1001 was apparently limited to that statute. *United States v. Flake*, 746 F.2d 535, 537-38 (9th Cir.1984), *cert. denied*, 469 U.S. 1225, 105 S.Ct. 1220, 84 L.Ed.2d 360 (1985); *see also Gaudin*, 28 F.3d at 945.

A. Plainness and *Gaudin*'s Change in the Law

No one disputes that, in light of *Gaudin*, the jury instructions were in error. *See United States v. Calverley*, 37 F.3d 160, 162-63 (5th Cir.1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995); *Oreira*, 29 F.3d at 188. Plain errors are those that are clear and obvious under current law. *Olano*, 507 U.S. at 732-34, 113 S.Ct. at 1777. When McGuire was tried, existing precedent dictated that materiality was a question of law for the court. At that time, any error in the jury instructions, which affirmatively removed that issue from the jury's consideration, was neither clear nor obvious. Now, of course, *Gaudin* makes that error patently clear and obvious.

The issue then becomes whether "plainness" is measured at the time of trial or at the time of appeal. We conclude that, when there is no error under existing law at the time of trial, but plain error under existing law when the appeal is decided, the plainness prong of Rule 52(b) is satisfied. *Olano* expressly declined to decide this issue, but the Supreme Court tipped its hand by stating that "[at] a minimum, the Court of Appeals cannot correct error pursuant to Rule 52(b) unless the error is clear under current law." *Id.* Our recent en banc decision in *Calverley*, which did not involve any change in the nature of error from the time of trial to the time of appeal, is not

to the contrary.[7] *Calverley* omitted language tying "current law" to the "Court of Appeals" disposition, stating that Rule 52(b) " '[a]t a minimum' contemplates an error which was 'clear under current law' at the time of trial." The Court went on to footnote *Olano*'s failure to decide the special case presented when there is a change in the law between the time of trial and the time of appeal. *See Calverley*, 37 F.3d at 162-63 & n. 18.

Any other construction would compromise the well-settled principle that criminal defendants are entitled to the benefit of changes in the law announced while their cases are pending on direct review. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Oreira*, 29 F.3d at 188. To deny a criminal defendant the benefit of a rule that clearly departed from well-settled law to the contrary, merely on the basis that he failed to make a futile and probably frivolous objection, does not accord with basic fairness. We do not decide whether error that was merely undecided or unclear at the time of trial, and subsequently becomes clear on appeal, is subject to review for plain error. *See, e.g., United States v. Hurley*, 63 F.3d 1, 14 (1st Cir.1995) ("[t]his case does not present the conundrum of a failure to object followed by a wholly unexpected change in law"). That issue will be left for another day.

We take comfort in the fact that many of our sister circuits have similarly concluded that when there has been a change in the law, provisions must be made such

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[7] Calverley pled guilty as to both counts of his indictment. The critical issue in *Calverley* related to sentencing, not guilt or innocence.

that whether the error is plain can be determined with reference to the law existing at the time of appeal. *United States v. Walker*, 59 F.3d 1196, 1198 (11th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 547, 133 L.Ed.2d 450 (1995); *United States v. Keys*, 67 F.3d 801, 809-10 (9th Cir.1995); *United States v. Retos*, 25 F.3d 1220, 1230 (3d Cir.1994); *United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995); *United States v. Jones*, 21 F.3d 165, 172 (7th Cir.1994); *United States v. Washington*, 12 F.3d 1128, 1138 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994).[8] Although the district court faithfully followed

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[8] For example, the D.C. Circuit's "supervening decision doctrine" operates as an exception to the general requirement that review under Rule 52(b) requires an error that was plain at the time of trial. *E.g., United States v. Baucum*, 66 F.3d 362, 363 (D.C.Cir.1995); *United States v. Washington*, 12 F.3d 1128, 1138 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994). Some decisions of that Court review errors made plain by supervening changes in the law without clear reference to Rule 52(b) or plain error analysis, suggesting that a supervening change provides an independent basis for reviewing otherwise forfeited error. *E.g., United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C.Cir.1995).

We are aware that the more traditional concerns addressed by rigorous review of forfeited error are not operative when a criminal defendant's failure to object is excusable. McGuire could not have foreseen the change in the law that occurred after his trial. Nonetheless, we conclude that the discretion allowed the Court of Appeals by *Olano* is the more appropriate vehicle for remedying such error. *Accord United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir.) ("The better view is that Rule 52(b) is the sole source of our authority to correct errors not preserved by objection."), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995); *United States v. Retos*, 25 F.3d 1220, 1228 (3d Cir.1994)

existing precedent and the jury instructions were not clearly in error when given, it is now obvious on the basis of *Gaudin* that the instructions unconstitutionally precluded the jury from considering an essential element of the offense. That error is plain for purposes of Rule 52(b).

B. McGuire's Substantial Rights

Finally, forfeited plain error is not reviewable under Rule 52(b) unless it affected the defendant's substantial rights. "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." *Olano*, 507 U.S. at 734-36, 113 S.Ct. at 1778. The inquiry is much the same when the court reviews error preserved at trial, under the familiar harmless error analysis, except that in those cases, it is the government that bears the burden of demonstrating beyond a reasonable doubt that the error was harmless. FED.R.CIV.P. 52(a); *Id.* at 734-36, 113 S.Ct. at 1778. Although many constitutional

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(review of error made plain by supervening Supreme Court decision limited to Rule 52(b) plain error principles); *United States v. Jones*, 21 F.3d 165, 172 (7th Cir.1994) (although a supervening change in the law excuses the defendant's failure to object, the court's review is still subject to Rule 52(b)). Published cases in other circuits have uniformly applied Rule 52(b) analysis to *Gaudin* error, and even the D.C. Circuit has not explicitly held to the contrary.

We do not construct a legal fiction that the error was plain at the time of trial. Rather, we intend to construct an exception to that requirement for cases in which the law has clearly changed between the time of trial and direct appeal. In those rare cases, the plainness of the alleged error should be measured at the time of appeal.

errors can be harmless, "structural" errors that affect the framework within which the trial proceeds are not subject to that analysis. *Arizona v. Fulminante*, 499 U.S. 279, 307-09, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991). *Olano* explicitly left open the issue of whether Rule 52(b) requires that a defendant demonstrate prejudice when the error at issue is structural. *Olano*, 507 U.S. at 734-36, 113 S.Ct. at 1778.

Harmless error analysis focuses on the effect of the alleged error on the verdict actually returned by the jury. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). When, as in this case, the jury was not instructed on an essential element of the offense, it is questionable whether there has been any constitutionally obtained verdict for harmless error analysis to act upon. *See Sullivan v. Louisiana*, 508 U.S. 275, 278-81, 113 S.Ct. 2078, 2081-82, 124 L.Ed.2d 182 (1993) ("to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury right"). Our own Court has spoken with a divided voice on the issue of whether failure to instruct on every essential element of the offense is plain error, structural error or error amenable to harmless error analysis. *See United States v. Oreira*, 29 F.3d 185, 188 n. 6 (discussing conflict and applying harmless error analysis); *United States v. Garza*, 42 F.3d 251, 253 (5th Cir.1994) (agreeing that, as the government conceded, a post-trial change in the law rendered failure to instruct on an essential element plain error); *United States v. Ortega*, 859 F.2d 327, 333 (5th Cir.1988) ("It is plain error for a judge to fail to instruct the jury on all essential elements of a crime, even though

such an instruction is not requested"), *cert. denied*, 489 U.S. 1027, 109 S.Ct. 1157, 103 L.Ed.2d 216 (1989); *United States v. Brown*, 616 F.2d 844, 846 (5th Cir.1980) ("we divine from precedent in this Circuit no rule that failure to specifically instruct on any single essential element of a crime per se constitutes plain error"); *United States v. Bosch*, 505 F.2d 78, 82-83 (5th Cir.1974) (failure to instruct on an essential element is not plain error when it is clear that the error was harmless). Even Supreme Court authority on the point appears to be conflicting. *Compare Pope v. Illinois*, 481 U.S. 497, 503 n. 7, 107 S.Ct. 1918, 1922 n. 7, 95 L.Ed.2d 439 (1987) ("to the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof . . . they are no longer good authority"), *with Sullivan v. Louisiana*, 508 U.S. 275, 278-81, 113 S.Ct. 2078, 2081-82, 124 L.Ed.2d 182 (1993) (harmless error analysis inapplicable when jury verdict secured in violation of *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970), which requires conviction on the basis of every essential element of the offense). *Gaudin* itself did not resolve the issue because the government failed to challenge the Ninth Circuit's determination that the error identified was both plain and structural, and therefore not amenable to harmless error analysis. *Gaudin*, ___ U.S. at ___, ___, 115 S.Ct. at 2320, 2321 (Rehnquist, J. concurring).

The conflict within our own Circuit makes it inadvisable, and perhaps impermissible, to conclusively resolve in this case the proper scope of appellate review when the district court fails to instruct the jury on an essential

element of a criminal offense. Regardless of whether such an error is structural, McGuire made a specific factual showing such that, in the circumstances of this case, the district court's failure to instruct on the issue of materiality was plain error which did affect his substantial rights.

Materiality was critical to Mcguire's defense at trial. As to the first form 8300, the government alleged that McGuire "falsely stated the identity of the individual from whom the cash was actually received and failed to disclose the person on whose behalf the transaction was conducted." As to the second form, the government alleged only that McGuire "falsely stated the identity of the individual from whom the cash was actually received." McGuire argued at trial: (1) that he subjectively believed the money was being delivered to him by Bolivar rather than Flores; and (2) that once he disclosed Flores' name in the second form 8300, the internal revenue service would not be misled by the information provided in that form. *See Gaudin*, ___ U.S. at ___, 115 S.Ct. at 2313 (a statement is material if it has a natural tendency to influence the decision of the decision-making body to which it is addressed). Therefore, an essential premise in McGuire's defense was that any misidentification of Bolivar was not material because the identity of the client was also disclosed on the form. McGuire elicited testimony relevant to this issue from his expert, who had significant experience in the criminal investigation division of the Internal Revenue Service. On the basis of the present record, the district court's denial of McGuire's Fifth and Sixth Amendment right to a jury determination on every essential element of the charged offense was not

harmless. The district court's instruction that materiality was not an issue for the jury, although a correct statement of the law when given, constituted plain error affecting McGuire's substantial rights. Therefore, this court has authority pursuant to Rule 52(b), to correct that error. *Olano*, 507 U.S. at 734-36, 113 S.Ct. at 1778.

C. Remedial Discretion

"Rule 52(b) is permissive, not mandatory." *Olano*, 507 U.S. at 734-36, 113 S.Ct. at 1778 (when the life or liberty of a criminal defendant is at stake, the courts of appeal have the authority to correct otherwise forfeited error when it is plain and affects the defendant's substantial rights). Whether plain error should be corrected lies within the sound discretion of the appellate courts. *Id.* at 734-37, 113 S.Ct. at 1778-79. The Supreme Court instructs that remedial discretion under Rule 52(b) should be exercised only when the error " 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at 736-37, 113 S.Ct. at 1779 (quoting *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936)). Whether our remedial discretion should be exercised is a particularized inquiry that necessarily depends upon the facts of the specific case as well as the extent of legal prejudice imposed upon the defendant. *See Calverley*, 37 F.3d at 164. Moreover, an error may affect the substantial rights of the defendant without also rising to the level that it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

We are convinced that the circumstances of this case merit exercise of our remedial discretion. First, the statutes of conviction, § 6050I and § 7206(1), both expressly require that the statements at issue be material. *Compare, United States v. Taylor,* 66 F.3d 254 (9th Cir.1995) (distinguishing *Gaudin* on the basis that materiality is neither an express nor an implicit element of 18 U.S.C. § 287). Second, the materiality of McGuire's statements identifying Bolivar as the payor was a critical part of McGuire's defense to the count of conviction, and the subject of conflicting testimony at trial. Considered as a whole, the record presents a serious factual question regarding the materiality of McGuire's statements. *United States v. Keys,* 67 F.3d 801, 811-12 (9th Cir.1995). Third, refusing to exercise our remedial discretion to correct the plain error identified in this case would result, not only in the denial of McGuire's Fifth and Sixth Amendment rights, but in an abdication of the principle that we adjudicate cases pending before this Court on direct review "in light of our best understanding of governing constitutional principles." *Griffith v. Kentucky,* 479 U.S. 314, 323, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987). Given the circumstances of this case, we conclude that the district court's failure to instruct on materiality seriously affected the fairness and integrity of McGuire's trial and, potentially, the public reputation of judicial proceedings. *See Griffith,* 479 U.S. at 322, 107 S.Ct. at 713 ("failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"). We will exercise our discretion so as to not let the error stand. McGuire's conviction is reversed and the case remanded for further proceedings consistent with this opinion.

BEST AVA

III. Refusal to Deliver *Ratzlaf* Willfulness Instruction

Having concluded that the case must be retried, it is appropriate to address at least one issue that relates to the count of conviction and is likely to recur on remand. McGuire was convicted for violation of 26 U.S.C. § 6050I(f)(1)(B), in combination with 26 U.S.C. § 7206(1), which requires a showing of willfulness. McGuire contends that the district court erred by refusing to give his requested instruction on willfulness, which was based on the Supreme Court's holding in *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994). At issue in *Ratzlaf* were provisions of the Bank Secrecy Act which impose on financial institutions a reporting obligation similar to that imposed by § 6050I. Title 31 U.S.C. § 5324 states an offense for structuring a transaction to evade the reporting requirement, while § 5322 specifies criminal penalties for willful violation of § 5324. Like McGuire, Ratzlaf was charged both with the offense of purposefully evading the obligation and with the penalty provision, which required a showing of wilfulness. *Ratzlaf*, ___ U.S. at ___, 114 S.Ct. at 657. *Ratzlaf* held that the statutory formulation of the offense (§ 5322 and § 5324) required both government proof and a jury instruction on the issue of whether Ratzlaf willfully, i.e. with knowledge that his conduct was unlawful, violated § 5324. *Id.* at ___, 114 S.Ct. at 663.[9]

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[9] Less than six months after *Ratzlaf* was decided Congress amended the Bank Secrecy Act by incorporating the penalty provision previously codified as § 5322 into the reporting requirement of § 5324 and by redefining the elements of the offense to exclude any requirement of willfulness. *See*

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Ratzlaf does not provide the controlling definition of willfulness for prosecutions under 26 U.S.C. § 7206(1). Willfulness, for the purpose of that section, is defined as the intentional violation of a known legal duty. *United States v. Pomponio*, 429 U.S. 10, 11-13, 97 S.Ct. 22, 23-24, 50 L.Ed.2d 12 (1976); *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir.1993). Although the jury was not given that precise definition, the jury was adequately instructed on the issue of willfulness. Instruction 17, an instruction that applied to all counts, charged the jury on the issue of specific intent:

> The crimes charged in this case are serious crimes which require proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to disobey or disregard the law.

And in Instruction 21, the jury was charged:

> The word "willfully" in these instructions[ ] means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law. Mere negligence, even gross negligence, is not sufficient to establish willfulness.

H.R.Conf.Rep. 103-652, 103d Cong., 2d Sess (1994), *reprinted in*, 1994 U.S.C.C.A.N.1977, 2024 (restoring the "clear Congressional intent" to require no more culpable conduct than a purpose to evade the reporting requirement).

> If a person in good faith believes that an income tax return, as prepared by him, truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he cannot be guilty of "willfully" making or subscribing a false or fraudulent return.

The district court did not abuse its discretion by refusing McGuire's requested instruction on the issue of willfulness.

We note also that Instruction 36, relating to the count of conviction, neither identifies nor requires specific findings on the essential elements required for conviction under § 7206(1). On remand, if the case is retried, the jury must be required to find all of the essential elements set forth in § 6050I(f)(1)(B) and § 7206(1).

Finally, McGuire also claims on appeal that the evidence was insufficient to support his conviction and that he was unduly prejudiced by the prosecutor's improper closing remarks. Having reviewed those claims under the applicable standards of review, we find no reversible error. There are, therefore, no double jeopardy barriers to McGuire's retrial on remand. Our conclusions as to these issues are necessarily limited by what appears in the present, rather voluminous, record. Consideration was not limited to the testimony of the undercover agents and the transcripts of their conversations with McGuire. This panel's disposition of McGuire's sufficiency claim will obviously be of no binding effect on any subsequent appeal should McGuire be retried. We have likewise reviewed for plain error McGuire's claims on appeal that the jury instructions impermissibly allowed conviction on

the basis of either form 8300 and that the jury instructions directed a verdict of guilty. Having considered the arguments and the entire record, we are persuaded that failure to review those claims on appeal does not "seriously affect the fairness, integrity or public reputation of judicial proceedings."

CONCLUSION

For the foregoing reasons, McGuire's conviction for violation of 26 U.S.C. § 6050I and 26 U.S.C. § 7206(1) is REVERSED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

WIENER, concurring specially:

I concur in the result reached in Judge DeMoss's fine opinion; however, I respectfully disagree with a key aspect of his analysis. In particular, when both the trial court's ruling and the defendant's failure to object to that ruling are fully explained and excused by a supervening change in the law, I would not, for the reasons stated more fully below, visit upon that defendant the burden of plain error review. Accordingly, I do not join in either the last sentence of Part I of Judge DeMoss's opinion (holding that plain error applies in this case) or the analysis set forth in Part II. Yet, despite the differences in the way that we get there, we reach the same result: McGuire's conviction for violation of 26 § U.S.C. 6050I and 26 U.S.C. § 7206(1) must be reversed, his sentence vacated, and his case remanded for a new trial on those charges.

I

INTRODUCTION

Out of the blue, and overturning law long-settled in this and all other circuits, the Supreme Court, in *United States v. Gaudin*,[1] held that when, in a criminal prosecution materiality is an element of the crime charged, the Constitution requires that the materiality element be decided by the jury as an issue of fact, not by the judge as an issue of law (hereafter, *Gaudin* Rule). In this appeal, we must decide a narrow issue: As the trial judge in McGuire's case withheld the question of materiality from the jury and decided that issue himself, should we reverse McGuire's conviction? In positing that question, this appeal presents this court with an opportunity to clarify a broader issue that is sure to resurface: How do we review unobjected-to evidentiary rulings, jury charges, and the like, that were clearly unobjectionable at trial but that have become "error" post trial by virtue of a supervening change in the law (hereafter, *Gaudin*-type issue)?[2] More specifically, when a supervening change in

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[1] ___ U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

[2] This is the second time we have seen this type issue in the last year. A similar problem arose after *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (willfulness requirement of 31 U.S.C. § 5324(3) mandates that the government prove, and the jury be instructed, that a defendant acted with knowledge that the structuring he undertook was unlawful). We have not yet had to decide this larger issue in the context of *Ratzlaf*. *See, e.g., United States v. Garza*, 42 F.3d 251, 253 (5th Cir.1994) (government conceded jury instructions were plain error under *Ratzlaf*), *cert. denied*, ___ U.S.

the law explains (and unquestionably should excuse) the absence of a trial objection, do we review *Gaudin*-type issues (1) under the plain error rubric or some variation thereof, or (2) under the harmless error rubric, just as we would if a contemporaneous objection had been made? Judge DeMoss concludes that a *Gaudin*-type issue should be reviewed under the plain error rubric. Instead, I would review a *Gaudin*-type issue as if there had been a contemporaneous objection, and thus would ultimately apply the harmless error analysis.

To review *Gaudin*-type issues under the plain error rubric strikes me as patently unfair to defendants and logically antithetical to the purpose of plain error. Both conceptually and practically, the plain error rule is intended to encourage and facilitate judicial efficiency. We require a defendant to make contemporaneous objections so that the district court will have an opportunity to correct its own errors instanter and thereby avert unnecessary appeals and multiple trials. Consequently, when the defendant is derelict and fails to bring a correctable error to the court's attention, we deem him to have forfeited the error. Accordingly, to secure a reversal on appeal despite his forfeiture, we require the defendant to establish that the unobjected-to error was so extreme that it affected his substantial rights.[3] In short, we do not want

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___, 115 S.Ct. 2263, 132 L.Ed.2d 268 (1995); *United States v. Oreira*, 29 F.3d 185, 189 (5th Cir.1994) (defendant requested proper jury instruction and objected to its omission at trial, and thus preserved *Ratzlaf* issue for review).

[3] Fed.R.Cr.P. 52(b).

defendants sandbagging the trial judge and then wasting judicial resources with a "gotcha" reversal on appeal.

When there is a supervening change in the law, however, as there was here, none of these concerns are present. After all, a pre-*Gaudin* objection would have been summarily overruled by the district court, so no purpose of judicial economy is served by "penalizing" the defendant for failing to perform the hollow and obnoxious act of objecting in the face of well-settled precedent to the contrary (unless at the time of trial there was reason to expect that a change in the law is in the offing, e.g., cert. pending, advisory committee recommendations in the mill, a bill to change the law winding its way through Congress, or the like).

II

DISCUSSION

A. MUST WE APPLY PLAIN ERROR REVIEW?

1. How Rule 52(b) Works[4]

As a threshold issue, we must decide whether under *United States v. Olano*[5] or *United States v. Calverley*,[6] or

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[4] Rule 52(b) reads as follows:

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

[5] 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993).

[6] 37 F.3d 160 (5th Cir.1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995).

both, our appellate authority to review *Gaudin*-type issues is limited to Rule 52(b), or whether we have independent authority to review such "errors" directly. Recently, in *Olano*, the Supreme Court clarified our general appellate authority under Rule 52(b) to review unobjected-to errors.[7] The Court identified three criteria, each of which it characterized as a *"limitation on appellate authority"*[8]: First, there must be "error," or deviation from a legal rule, which nas not been *waived*.[9] Second, the error must be "plain," which at a minimum means "clear under current law."[10] Third, the plain error must "affect[ ] substantial rights," which normally requires a showing of prejudice.[11]

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[7] *See Olano*, 507 U.S. at 732-37, 113 S.Ct. at 1777-79.

[8] *Id.* at 732-34, 113 S.Ct. at 1777. In *Calverley*, we recognized these three criteria and explained that in "exceptional circumstances, appellate courts may, in the interest of justice, notice errors to which no objection has been made"; however, we also qualified that statement in the next sentence by stating that "[s]uch circumstances are *sharply circumscribed* by the plain error standard requiring that unobjected-to errors be 'plain' and 'affect substantial rights.' " 37 F.3d at 162 (emphasis added & footnotes omitted).

Although the three *Olano* criteria have been described by the Supreme Court and this court as *limitations* on appellate authority to review unobjected-to errors, neither court has expressly held that Rule 52(b) provides the *exclusive* authority or means to review unobjected-to errors.

[9] *Olano*, 507 U.S. at 732-34, 113 S.Ct. at 1777.

[10] *Olano* at 732-34, 113 S.Ct. at 1777.

[11] *Olano*, 507 U.S. at 732-36, 113 S.Ct. at 1777-78; *Calverley*, 37 F.3d at 164.

In plain error review under Rule 52(b), as contrasted with harmless error review under Rule 52(a), the defendant bears the burden of persuasion.[12] The three *Olano* criteria are necessary but alone they do not require a court to correct an unobjected-to error. Even when all three prerequisites are established, the decision whether to correct the error falls within the appellate court's *discretion*. In short, Rule 52(b) is permissive, not mandatory: If the forfeited (but not waived) error is "plain" and "affects substantial rights," an appellate court has the *authority* to reverse or vacate, but is *not required* to do so.[13]

2. Most Circuits Apply Plain Error

Judge DeMoss in his opinion and Judge Smith in his dissent join the majority of the circuit courts in concluding that plain error review should be applied to *Gaudin*-type issues. Those courts agree that *Olano* seems to require that plain error review be applied to *all* unobjected-to errors.[14] This conclusion derives from the

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[12] *Olano*, 507 U.S. at 734-36, 113 S.Ct. at 1778; *Calverley*, 37 F.3d at 164.

[13] *Id.*

[14] *See United States v. Lopez*, 71 F.3d 954, 960-61 (1st Cir.1995); *United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir.) (discussing Rule 52(b) versus independent authority to review *Gaudin*-type issues and concluding that "[t]he better view is that Rule 52(b) is the sole source of our authority to correct errors not preserved by objection."), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995); *United States v. Retos*, 25 F.3d 1220, 1228 (3d Cir.1994) ("Because Retos failed to object to the jury instruction [which is now erroneous under *Ratzlaf*] at trial, our review is limited to plain error under Federal Rule of Criminal

following syllogism: (1) Under *Olano*, all *forfeited errors* are subject to plain error review; (2) a *Gaudin*-type issues is a *forfeited error;* (3) ergo we must apply plain error review to *Gaudin*-type issues. Even if I had to agree with the first premise, the entire motivation of my writing separately is my abject disagreement with the second premise: All logic is defied if we hold that a *Gaudin*-type issue is "forfeited error" for lack of a contemporary objection. Wholly distinguishable from the situations in *Olano* and *Calverley*, the court's treatment of *materiality* in McGuire's trial – when viewed in light of the law as it existed then, the way that Judge Smith tells us we must – *was not error at all.* Consequently, McGuire had nothing to which he could object and thus nothing to *forfeit.* This logical fallacy in the second premise produces a fatally flawed syllogism, in turn producing the flawed conclusion that we must apply plain error review to *Gaudin*-type issues. Before we attach conclusionary tags and labels such as "forfeited error," it seems meet and proper that we pause and examine the definition.

Procedure 52(b)"); *United States v. Jones*, 21 F.3d 165, 172 (7th Cir.1994) (holding that even though supervening change in law excuses failure to object, all unobjected-to errors are subject to plain error review on appeal); *United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir.1994) (en banc) ("Because Gaudin did not object to the instruction . . . we must . . . determine whether this error was 'plain error.' "); *United States v. Walker*, 59 F.3d 1196 (11th Cir.) (Regardless of change in the law, "we review issues not preserved below for plain error."), *cert. denied*, ___ U.S. ___, 116 S.Ct. 547, 133 L.Ed.2d 450 (1995); *United States v. Washington*, 12 F.3d 1128, 1138 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994).

3. Where Was The Error?

In *Olano*, the Court was careful to articulate the difference between waiver and forfeiture: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' "[15] Even though we have two clear categories – waiver and forfeiture – the issue presented in this appeal does not fit logically into either. There was no waiver because the case law at the time of trial indicated beyond cavil that no defendant in this circuit (or anywhere else for that matter, even in the Ninth Circuit) had a right to have a jury determine the question of materiality.[16] Moreover, nothing was "in the works" or "on the drawing boards" that would have put anyone on notice that a major change in the law was under consideration. So, just as he waived no "error," McGuire forfeited no "error": How could a defendant timely object to the violation of a "right," when all case law to date made pellucidly clear that no such "right" existed. Thus it is axiomatic that if *Gaudin*-type issues are neither waived error nor forfeited error, they must be something else. Whatever else they may be, they were not errors as of the time of the trial.

The trial court could not have ruled other than the way it did, so it committed no error; in failing to object to that which was non-objectionable, the defense committed

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[15] 507 U.S. at 732-34, 113 S.Ct. at 1777 (citations omitted); *See also Calverley*, 37 F.3d at 162.

[16] *See, e.g., United States v. Swaim*, 757 F.2d 1530, 1534 (5th Cir.), *cert. denied*, 474 U.S. 825, 106 S.Ct. 81, 88 L.Ed.2d 66 (1985).

no error – either by waiver or forfeiture. Thus it is a badly misleading fiction to label a *Gaudin*-type issue as *error.*[17] Quite simply, we should not try to force this square *Gaudin* peg into the round plain error hole drilled by *Olano* and *Calverley;* instead, we should proceed to carve out a separate but limited *square* hole into which *Gaudin*-type "errors" fit, then define the proper standard under which we review them. In the legal vernacular, *Olano* and *Calverley* are "distinguishable" from *Gaudin*-type issues. It follows, then, that as the issue we now face was not an error at all at the time of trial, our review should not be restricted to plain error, and we should not be constrained by the cases interpreting that standard.

B. THE SUPERVENING DECISION DOCTRINE

1. The D.C. Circuit

In the D.C. Circuit, the "supervening decision doctrine" appears to allow a direct harmlessness review of a true *Gaudin*-type issue.[18] Under this doctrine, the appellate court can consider issues not raised at trial *if* a supervening decision has "changed the law in appellant's

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[17] Judge Smith's analysis has a curiously convenient relationship to this fiction, giving rise to what I see as a "chicken or egg" problem. For even though he begins with the proposition that plain error is the applicable standard, he ultimately concludes that there was no error at trial. Which question comes first: (1) was there an error, or (2) do we apply plain error review?

[18] *See United States v. Washington,* 12 F.3d 1128, 1138 (D.C.Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994).

favor and the law was so well settled at the time of trial that any attempt to challenge it would have appeared pointless."[19] The D.C. Circuit offered two justifications for the supervening decision doctrine. First, it would be unfair, and even counter-productive to the efficient administration of justice, to expect a defendant to object at trial when existing law is so clear that it forecloses any possibility of success.[20] Second, unless appellate courts consider the effect of a supervening decision in such a situation, the defendant will be denied the benefit of the change in the law.[21] (This second prediction would come true every time if we were to follow the position advocated in today's dissent). Regrettably, the D.C. Circuit has not yet made clear whether this doctrine operates only *within* the limitations of Rule 52(b) or independently as separate authority and procedure for reviewing *Gaudin*-type issues *directly* for harmlessness.

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[19] *Id.* at 1139. *See also United States v. Baucum*, 66 F.3d 362, 363 (D.C.Cir.1995) (per curiam) ("[U]nder the supervening-decision doctrine, we will consider an issue not raised at trial 'where a supervening decision has changed the law in appellant's favor and the law was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless.' "); *United States v. Rhodes*, 62 F.3d 1449, 1450 (D.C.Cir.1995) (same).

[20] *Washington*, 12 F.3d at 1139.

[21] *Id.*; *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("We therefore hold that a rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

In *United States v. Washington*[22] for example, a panel of the D.C. Circuit recited the plain error standard, then proceeded to define the supervening decision doctrine. The structure of the *Washington* analysis would thus appear to imply that the doctrine must be applied within the confines of Rule 52(b) only. Ultimately, however, the *Washington* panel declined to apply the doctrine to the facts before it because the alleged supervening decision was determined not to be a "change" in the law.[23] As a result, the analysis is aborted and we are left without a precise application of the doctrine but with a negative

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[22] 12 F.3d at 1138 (supervening change in the reasonable doubt jury instruction). *Washington* involved a challenge to a jury instruction directing the jury that it could find the defendant guilty if the evidence caused them to have a "strong belief" in the defendant's guilt. Washington did not object at trial, but urged on appeal that *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), a supervening decision case, changed the law, and required reversal despite the lack of objection. In *Sullivan*, the Supreme Court held that a jury instruction which equates "beyond a reasonable doubt" with "strong belief" is constitutionally deficient.

[23] The court held that at the time of trial the constitutionality of the "strong belief" jury instruction *was not so well-established that any objection would have seemed futile.* According to the *Washington* court, no court of appeals had upheld the "strong belief" jury instruction at the time of trial and several cases in that circuit should have put the defendant on notice of the deficiency of such an instruction. *Id.* at 1139. That cannot be said of *McGuire* and "materiality" pre-*Gaudin*. Thus, the supervening decision doctrine did not apply. *See also Baucum*, 66 F.3d at 364 (reaffirming availability of supervening decision doctrine, but declining to apply for reasons similar to *Washington:* (1) challenging the constitutionality of a new statute would not have been futile; (2) defendant on notice because previous challenge had been successful).

pregnant implying its applicability to a situation involving a truly unforeseeable change in the law.

Indeed, in *United States v. Rhodes*,[24] a different panel of the D.C. Circuit embraced the supervening decision doctrine and held "[a]ccordingly, we address [defendant's unobjected-to error] on the merits."[25] Significantly, *Rhodes* says nothing about Rule 52(b) or plain error review, strongly suggesting that the supervening decision doctrine (1) operates outside Rule 52(b), and (2) provides an independent authority to review that rare breed of unobjected-to "errors" which are produced by true post-trial, unforeseeable changes in the law.

2. Follow the D.C. Circuit's Lead

I would follow the path enlightened by the D.C. Circuit and hold that the supervening decision doctrine pertains, serving to preserve an issue for appeal in the relatively rare instances when the following factors coincide: (1) law that is well-settled and thus unobjectionable at the time of trial (2) is changed (3) without warning (4)

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[24] 62 F.3d 1449 (D.C.Cir.1995). This panel addressed the applicability *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) and *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), 62 F.3d 1449 (D.C.Cir.1995). Both of these decisions, the defendant urged, were supervening changes in the law of double jeopardy.

[25] *Rhodes*, 62 F.3d at 1452.

during direct appeal. By *changed* I mean reversed or overruled, not merely "fine tuned" or clarified.[26] 6] When all factors are present, the defendant would be entitled to the benefit of the supervening change.[27] The supervening change in the law both explains and excuses the absence of an objection by the defendant. Accordingly, I would treat such an issue as though it had been preserved for appellate review, and would test for harmlessness rather than apply plain error scrutiny.

Although my analysis would treat the subject issue as a non-error at trial and as an error on appeal, my position is consistent with the relevant precedent. When the materiality issue in the instant case is viewed as of the time of *trial*, there was no error under the case law of this circuit; however, when the same issue is viewed as of the time of *appeal*, an "error" has materialized out of thin air solely because the Supreme Court has overruled prior precedent. In other words, at McGuire's pre-*Gaudin* trial, there was no error; on appeal post-*Gaudin*, there is

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[26] I find it both significant and important to my analysis that the Supreme Court in *Olano* and this court in *Calverley* left open the question whether plain error review should apply "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been *clarified*." For, in the instant case, the "error" was not just unclear at trial, it was not error at all; and the applicable law has not just been "clarified," it has been changed entirely.

[27] *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (requiring that criminal defendants receive the benefit of changes in the law governing the conduct of criminal prosecutions, at least those made during the pendency of his appeal).

"error." The supervening decision both creates this distinction and excuses the absence of a contemporaneous objection. Thus the supervening decision doctrine should be interposed to preserve the *Gaudin*-type issues for appellate review because by definition they can arise only after trial and before exhaustion of all appellate procedures. The "bottom line" is that, unless as an appellate court we now come forward with a new rule of review, no criminal defendant will ever receive the Griffith benefit of a supervening change in the law.

This is precisely the flaw that, with genuine respect, I discern in Judge Smith's dissent: His literal examination, as of the time of trial, of the "error" produced by a post-trial sea change in the law ensures that no defendant will ever receive any benefit from a supervening change in the law. He first concludes that, as there was no objection at trial, plain error applies. Second, he looks to the case law at the time of trial and, as the supervening change came after the trial, he finds no error. Third, he points out that, as a result, the second necessary precondition of plain error review – that the error be plain – is not satisfied. He then concludes that the failure to meet this precondition has "tied his hands" and he cannot review the issue. Essentially, Judge Smith uses plain error review to bar defendants from benefiting from a supervening change. If we follow this "cut 'em off at the pass" approach, not only is McGuire denied the benefit of *Gaudin*, but henceforth every criminal defendant will necessarily be denied the benefit of a supervening change in any law. This cannot be.

3. Burden of Proof

To avoid reversal of a conviction under harmless error review, the *government* must establish that the defendant's substantial rights were *not* affected.[28] For all intents and purposes, Judge DeMoss's standard and my proposed standard are the same except that we place the burden of proof on the "substantial rights affected" issue on opposite parties. Judge DeMoss, by remaining within the stricture of the plain error rubric, burdens the *defendant* with the task of proving that his substantial rights were affected, while I, by following the supervening decision doctrine's harmless error procedure, would require the *government* to establish that the defendant's substantial rights were not affected.

The burden-shift I advocate here is not without precedent. True, when faced with a supervening decision *changing* the law, the Second Circuit sticks with the plain error fiction. But it does so with a slight yet significant twist: The burden of proof under the plain error analysis is shifted to the government, requiring it to show that the error did not affect the defendant's substantial rights.[29] As a practical matter, this is very close to, if not the same as, the treatment I am proposing.

Significantly, the Second Circuit justifies its burden shift by contrasting harmless error and plain error.[30] In the ordinary case, if it is clear at the time of trial that an

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[28] *See* Fed.R.Cr.P. 52(a).

[29] *See Viola*, 35 F.3d at 42.

[30] *Id.*

instruction or an evidentiary ruling is erroneous, the defendant knows or should know that he has a duty to object. And, if he fails to object, he forfeits his legal right to have the error corrected because he has impeded the judicial process by failing to prompt the trial court and afford it the opportunity timely to correct the error. In that ordinary case, it is eminently fair to hold a defendant accountable for his failure and to deter defendants from strategically withholding an objection in order to seek reversal on appeal.[31]

Conversely, when a supervening decision truly changes well-settled law, the analysis changes dramatically. A defendant has no duty to object to a jury charge that is indisputably supported by established law. Obviously, an objection would produce no self-correction by the trial court, so the absence of an objection has no effect on the efficient administration of the judicial system. It follows that, as no such legal right existed at the time of trial, the defendant did not "forfeit" a "right" by not making an objection. To penalize defendants for failing to challenge entrenched precedent would only encourage frivolous objections and appeals. Surely, when the source of what Judges Smith and DeMoss call plain error is a supervening change, the defendant has not been derelict in failing to object and should not be saddled with the burden of proving prejudice.[32] In this special context, then, just as in harmless error review under Rule 52(a), the *government* should bear the burden of showing that

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[31] *Id.*

[32] *Id.*

the "error" did *not* affect the defendant's substantial rights.

C. THE SUPERVENING DECISION DOCTRINE AND MCGUIRE

In McGuire's case, all elements of the supervening decision doctrine are present, and the government cannot establish that the failure to send the materiality issue to the jury was harmless. Under the law of this circuit as it existed at the time of trial, McGuire did not have the right to have the jury decide the issue of materiality.[33] During the pendency of his appeal, however, the Supreme Court reversed that very law and in so doing gave that right to all criminal defendants, including McGuire. McGuire's failure to object is explained and excused by this supervening change in the law. Thus, McGuire's *Gaudin*-type issue should be treated as though it had been preserved, authorizing review under the harmless error rubric, not under plain error.

Generally, an error is harmless if the reviewing court is certain, after viewing the entire record, that the error did not affect the defendant's substantial rights.[34] As noted by Judge DeMoss, McGuire vigorously contested the materiality issue. Throughout the trial, he insisted that the statements in question were not material. Indeed, this was his principal defense. As materiality was a hotly disputed element of the offense charged and was a key issue to the defense, the failure of the district court to

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[33] *Swaim*, 757 F.2d at 1534.

[34] *See* Fed.R.R.P. 52(a).

allow the jury to determine the element of materiality indisputably affected McGuire's substantial rights. I hasten to add that alone the presence of the supervening decision doctrine does not entitle a defendant to automatic reversal; it does nothing more than guarantee that the court will examine the record as a whole to determine whether the "error" retroactively produced by the supervening decision affected the defendant's substantial rights. Like Judge DeMoss, I am convinced that in this case it did. I am equally convinced that if only Judge Smith's view of the law would permit him to reach the substantial rights issue, he too would agree that here such rights were affected. And, although in this case we might all agree on the result, regardless of whether the burden of proving prejudice must be borne by the defense or by the government, such might not always be the case. Thus the importance of emphasizing a harmless error rather than a plain error analysis, and their respective burdens of proof, could easily loom large in a case with somewhat different factual aspects.

III

CONCLUSION

I find it particularly perverse to require a defendant either to object in the face of clearly established law to the contrary or face a stacked appellate deck in the form of plain error review. I find it equally perverse to deny a defendant appellate review of an issue arising from a supervening change in the law: *Griffith* demands that he is entitled to reconsideration in light of all changes in the law occurring during the pendency of his appeal. And I

find it a cruel irony to subject the defendant to plain *error* review when no *error* was committed at the time of the trial, either by the court in following the law as it then existed or by the defense in not interposing a frivolous objection. Consequently, I urge this circuit to adopt a separate jurisprudential doctrine for the review of *Gaudin*-type issues – specifically, the supervening decision doctrine set forth above – and in such cases to avoid the plain error rubric. Although I have failed to win over either of my colleagues on this panel to my position, I specially concur in the result reached in Judge DeMoss's opinion and write separately in the hope of encouraging the rest of my colleagues to consider well adopting the supervening decision doctrine which I champion today.

JERRY E. SMITH, Circuit Judge, concurring in part and dissenting in part:

I.

While concurring in the remainder of the majority opinion, I respectfully dissent from part II, because I read *United States v. Calverley*, 37 F.3d 160 (5th Cir.1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995), as requiring us to consider the clarity of the law at the time of the claimed error, not at the time of review. *Calverley* holds that plain error *"at a minimum,* contemplates an error which was clear *under current law at the time of trial." Id.* at 162-63 (emphasis added, internal quotations omitted). Our analysis of the plaintiff's claim in *Calverley* shows that we meant what we said: "Assuming without deciding that studied analysis of [the law]

would lead to the conclusion that [the defendant's argument is correct], *this conclusion was not obvious when the court sentenced Calverley. . . . Consequently, neither the trial judge nor the prosecutor may be considered derelict in failing to notice [the error].*" *Id.* at 165 (emphasis added).[1]

In short, when assessing the clarity of a claimed error, we do not directly consider whether error occurred; instead, we determine only whether the district court was "derelict" in making an "obvious" error. Subsequent legal developments are irrelevant.

The majority, in its own words, "construct[s] an exception" to this rule. Maj. op. at 2817 n. 8. *Calverley* carefully lays out a series of bright-line rules, reconciling many of our precedents and overruling all others: "Although most of our opinions have recognized that an error must be clearly evident to be plain, a significant number have omitted or given insufficient weight to this element of the plain error equation. We today disavow all holdings and articulations inconsistent herewith." 37 F.3d at 163-64; *see also id.* at 163 n. 20, 164 n. 27 (citing overruled cases).

In summary, we decided *Calverley* en banc, just over a year ago, in a thorough and carefully-reasoned opinion

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[1] This passage clarifies our observation that the Supreme Court had declined to determine the relevance of intervening precedents. *See* 37 F.3d at 163 n. 18. While that footnote is ambiguous – it could mean either that we were also reserving that issue or that while we were speaking to it, we were aware that the case we were citing had not – the subsequent passage considers only the obviousness of the claimed error *at the time the district court made it.*

that overrules a significant number of panel opinions in order to clarify this area of the law. As a result, *Calverley* deserves to be interpreted generously and deferentially.[2]

II.

Although the majority is correct that an objection would have been perceived as frivolous at the time of trial, following *Calverley* would not cut against the policies that underlie plain error review. If we were concerned primarily with fixing mistakes, and not with protecting defendants against derelict judging, we would reverse all errors that are "plain" or "obvious" *to us*, regardless of whether other appellate judges have already ruled on similar claims. Whether a controlling precedent is decided before trial, between trial and appeal, or after appeal is pure happenstance; no matter how we conduct plain error review, we will treat defendants differently at divers times.

We therefore review forfeited errors only to protect "the fairness, integrity, [and] public reputation of judicial proceedings,"[3] and we do so by ensuring that criminal

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[2] Most recently, this court has interpreted *Calverley* in a similar fashion, in *United States v. Dupaquier*, 74 F.3d 615, 619 (5th Cir.1996). This caselaw is binding on us, as an interpretation and application of *Calverley*.

[3] We reverse even obvious errors only when they affect a defendant's substantial rights and "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 164 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)).

defendants are not convicted or sentenced in blatant disregard of settled law. But we do not insist that trials be free of forfeited error.

Application of *Calverley* in this context also would be consistent with the line of cases holding that we must apply the law as it is understood at the time of appeal. We review a claim of forfeited error only if the appellant satisfies the plain error requirements of FED.R.CRIM.P. 52(b), just as we consider a habeas corpus petition or 42 U.S.C. § 1983 claim only when our older precedent satisfies a set of threshold requirements.[4] If a claim meets the dictates of rule 52(b), we follow *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and evaluate the merits according to our current understanding of the law.[5]

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[4] *See Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (holding that habeas petitioners receive the benefit of "new rules" only in limited circumstances); *Rankin v. Klevenhagen*, 5 F.3d 103, 108 (5th Cir.1993) (deciding that officials have qualified immunity against suits under Sec. 1983 if their actions were reasonable in light of judicial precedent at the time of the offense).

[5] At least three Supreme Court Justices apparently agree that we must look to the clarity of the law at the time of the error. Although the government waived the plain error requirements in *Gaudin*, Chief Justice Rehnquist noted that because all circuits but one had found materiality to be a question of law, "it is certainly subject to dispute whether the error in this case was 'clear under current law.' " *United States v. Gaudin*, ___ U.S. ___, ___, 115 S.Ct. 2310, 2322, 132 L.Ed.2d 444 (1995) (Rehnquist, C.J., concurring, joined by O'Connor and Breyer, JJ.) (quoting *United States v. Olano*, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993)) (emphasis added). *See also United States v. Allen*, 76 F.3d 1348, 1366-68 (5th Cir.1996)

I agree with the majority that *Calverley* is not technically *stare decisis* on this point because it did not present the question of an intervening precedent. I also understand that application of *Calverley* to the facts at hand might appear harsh, as an objection would have been perceived as frivolous. Nonetheless, I would follow our own precedent and affirm.

(applying plain error analysis in light of intervening decision in *Gaudin*).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60648

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JIMMY D MCGUIRE
Defendant - Appellant

Appeal from the United States District Court for the Southern District of Mississippi, Biloxi

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(Filed Dec. 2, 1996)

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, and KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE', WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Pat S. Higginbotham
United States Circuit Judge

Supreme Court, U.S.
FILED
APR 30 1997
OFFICE OF THE CLERK

No. 96-1206

In the Supreme Court of the United States

OCTOBER TERM, 1996

JIMMY D. MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12 pp

QUESTION PRESENTED

Whether the court of appeals correctly determined that, as required by *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), the district court had submitted the materiality issue to the jury.

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In the Supreme Court of the United States

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No. 96-1206

JIMMY D. MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. 18-64) is reported at 79 F.3d 1396. The opinion of the en banc court of appeals (Pet. App. 1-17) is reported at 99 F.3d 671.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 31, 1996. A petition for rehearing was denied on December 2, 1996 (Pet. App. 65). The petition for a writ of certiorari was filed on January 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of filing a false Internal Revenue Service Form 8300, in violation of 26 U.S.C. 6050I(f)(1)(B).[1] He was sentenced to 36 months' imprisonment and assessed a $50,000 fine. A divided panel of the court of appeals reversed. Pet. App. 18-64. On rehearing en banc, however, the court of appeals vacated the panel decision and affirmed petitioner's conviction. *Id.* at 1-17.

1. In 1992, the IRS received information that petitioner had failed to report large sums of cash he had received from his law practice.[2] As a result, the IRS targeted petitioner in a sting operation. Two undercover IRS agents, operating under the assumed names "Hector Flores" and "Hector Martinez," approached petitioner in his law office, told him that they were cocaine traffickers, and sought his help in recovering cash that they said the police had seized and in which they both claimed an interest. Pet. App. 20-21.

Petitioner suggested to "Flores" and "Martinez" that, to secure his services, they would have to pay

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[1] He was acquitted on two counts of money laundering (18 U.S.C. 1956), one count of filing a false income tax return (26 U.S.C. 7206), and one count of conspiring to defraud the United States (18 U.S.C. 371).

[2] As the panel observed, "[t]he information generating the investigation was well-documented at trial. Several ex-clients testified that McGuire routinely required large cash payments in the tens of thousands of dollars and refused to give receipts. Other individuals offered testimony about large amounts of cash observed in McGuire's home and about large purchases made with cash." Pet. App. 20 n.2.

him a $20,000 retainer. Both men expressed concern, however, about having their names appear on the standard form—Form 8300—that the IRS requires for certain currency transactions in an amount exceeding $10,000. See generally 26 U.S.C. 6050I. The three men discussed different strategies for evading the Section 6050I filing requirement, such as structuring the transaction to permit payment partly in cash and partly by check. Pet. App. 21-22 & n.4. Petitioner ultimately recommended that Flores and Martinez bring in a third party who could hand petitioner the $20,000 retainer and who would not object to having his name appear on IRS Form 8300. Petitioner offered to set up a dummy file for that third party and to say, if anyone inquired, that petitioner was representing Flores and Martinez purely on a contingent-fee basis. *Id.* at 22.

The next day, Flores and Martinez arrived at petitioner's office with a third undercover IRS agent, who went by the name "David Bolivar." Flores told petitioner that he and Martinez had "thought about what you said yesterday" and that "[w]e'll just go ahead and give you the 20,000." Indicating Bolivar, Flores then told petitioner that "if you need to put somebody's name or something, you can put his name on it." Petitioner asked if Bolivar had the money, but Flores said, "I got it here." Petitioner told Flores to put the money away because "[i]t should not come from you" and, sounding exasperated, added that he was "gonna walk out of the room for just a second, okay?" As petitioner was leaving, Flores asked if he should "[j]ust give it to [Bolivar]." Petitioner responded by throwing up his hands and leaving the room. After he returned, Bolivar handed him $20,000 in cash. Pet. App. 22-23.

On February 7, petitioner prepared an IRS Form 8300 to report his receipt of the money. On Part I of the form, petitioner identified Bolivar, not Flores, as the "individual from whom cash was received." Petitioner wrote nothing on Part II, which seeks identification of the "person . . . on whose behalf this transaction was conducted." Pet. App. 23. Ten days later, petitioner filed an amended form. In Part I, he again falsely listed Bolivar as the payor, but, in Part II, he named Flores as the person on whose behalf Bolivar had paid the $20,000. Neither form listed Martinez, even though he had told petitioner that he had an interest in the "recovery" of the fictitious drug money. See *id.* at 21, 23.

2. At trial, the district court instructed the jury that, to convict petitioner on the Section 6050I charge,[3] it had to find, among other things, that he "knowingly and willfully caused or attempted to cause a trade or business to file a report required under this section [an 8300 form] that contained a *material omission or misstatement of fact*." Pet. App. 4 (emphasis added).[4] That charge (Instruction 36) was

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[3] Section 6050I(f)(1)(B) provides that "[n]o person shall for the purpose of evading the return requirements of this section * * * cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact." The "trade or business" at issue here was petitioner's law practice.

[4] In full, the district court instructed:

> Count 4 of the indictment charges the defendant with a violation of 26 U.S.C. § 6050I(f)(1)(B). The statute provides in pertinent part that:
>
> No person shall for the purpose of evading the return requirement of this section—

in marked contrast to an earlier charge (Instruction 20) that the district court had given in connection with a separate and unrelated count under 26 U.S.C. 7206(1), which prohibits knowing and willful false statements on an income tax return. With respect to that count, on which petitioner was ultimately acquitted, the court instructed the jury that it "need

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(B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact.

The essential elements that must be proved under that section are:

FIRST, that the defendant knew of a trade or business's duty to report currency transactions in excess of $10,000;

SECOND, that with such knowledge, the defendant knowingly and willfully caused or attempted to cause a trade or business to file a report required under this section [an 8300 form] that contained a material omission or misstatement of fact; and

THIRD, that the purpose of the material omission or misstatement of fact was to evade the transaction reporting requirement.

In this case the trade or business alleged in the indictment is the defendant's law practice. You may find the defendant guilty of violating § 6050I(f) whether or not the trade or business filed, or failed to file, a true and accurate 8300 form. In other words, if you find beyond a reasonable doubt that the defendant caused or attempted to cause a trade or business to file a return that contained a material omission or misstatement of fact, and that he did so for the purpose of evading the transaction report requirements, then you should find the defendant guilty as charged as to this count. If you do not so find, then you should find the defendant not guilty.

Pet. App. 3-4.

not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide." Pet. App. 3. The court did not similarly withhold the materiality issue from the jury on the Section 6050I count, however, and petitioner did not object that the court had done so. Pet. App. 28.

3. While petitioner's appeal was pending, this Court decided *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), which held that the materiality element in a false-statement prosecution under 18 U.S.C. 1001 must be submitted to the jury. A divided panel of the court of appeals followed *Gaudin* and reversed petitioner's conviction. All three judges on the panel agreed that the district court's materiality instruction was error under *Gaudin*. Judge DeMoss took the position that the "error" was reversible under the "plain error" standard of Rule 52(b) of the Federal Rules of Criminal Procedure. Pet. App. 25-37. Judge Wiener concurred in the result, but, because *Gaudin* superseded contrary Fifth Circuit precedent applicable at the time of trial, he would have reversed petitioner's conviction under harmless-error analysis rather than plain-error analysis. *Id.* at 42-60. Finally, Judge Smith dissented on the ground that Rule 52(b) did not permit relief because the "error" was not "plain" at the time of trial. *Id.* at 60-64. The panel unanimously rejected petitioner's other claims.

4. The court of appeals granted rehearing en banc on the *Gaudin* issue and reinstated petitioner's conviction. The majority held that the district court had in fact committed no error because it "did not withhold the element of materiality from the jury on the count on which [petitioner] was convicted." Pet.

App. 1. The court observed that, whereas "Instruction 20, pertaining to a count upon which [petitioner] was *acquitted*, incorrectly removed the issue of materiality from the jury[,] Instruction 36, * * * which specified the elements of the only count for which [petitioner] was convicted, did not do so." *Id.* at 2. Accordingly, the court affirmed petitioner's conviction.

Judge DeMoss, writing for himself and two other judges, dissented on the grounds that Instruction 36 improperly withheld the materiality element from the jury and, in any event, that it did not adequately define that element for the jury. Pet. App. 5-17. Judge Smith agreed with the dissent that the district court had committed error, but he would have affirmed petitioner's conviction on the ground that the error was harmless. *Id.* at 5 n.1.

ARGUMENT

1. Petitioner renews his contention (Pet. 6-9) that the district court committed reversible error by removing the materiality element from the jury's consideration. As the court of appeals observed (Pet. App. 1-2), however, the district court did in fact instruct the jury that "material[ity]" was an "essential element[]" of the offense charged in the count at issue here, see *id.* at 4, and it therefore committed no error with respect to that count. Moreover, there was no "reasonable likelihood," *Victor* v. *Nebraska*, 511 U.S. 1, 6 (1994), that the jury interpreted Instruction 20, which related only to a count charging petitioner with filing a false income tax return, as applicable to the count on which he was convicted, which charged him with the separate offense of filing a false currency transaction form. See 27 R. 1864-1865

(instructing jury to consider each count separately); Pet. App. 25 (panel opinion of Judge DeMoss) (acknowledging that Instruction 20 "was specific to a separate § 7206(1) violation involving conduct unrelated to the sting operation"). The court of appeals' factbound holding on this point was correct and warrants no further review.

Petitioner also contends that the district court erred in not providing the jury with an explicit definition of "materiality." But petitioner requested no such definition at trial, and he cites no case in which a court has held that the failure to provide such a definition is error, much less "plain error" that would justify a reversal even in the absence of a contemporaneous objection.[5] See generally Fed. R. Crim. P. 52(b). In any event, petitioner does not explain how he could have been prejudiced by the district court's failure to provide the legal definition to which he belatedly claims entitlement. Compare *Webster's Third International Dictionary* 1392 (1981) (defining "material" to mean having "real importance or great consequence") with *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (defining "material[]" to mean "having a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed").

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[5] Petitioner argues (Pet. 8-9) that the court of appeals' decision conflicts with *United States* v. *Wiles*, 102 F.3d 1043 (10th Cir. 1996), petition for cert. pending, No. 96-1430 (filed Mar. 10, 1997), and *United States* v. *DiRico*, 78 F.3d 732 (1st Cir. 1996). That is incorrect. In each of those cases, unlike this one, the court of appeals reversed a conviction for *Gaudin* error because the district court had completely withheld the materiality element from the jury's consideration.

2. Petitioner also suggests (Pet. 9) that the Court should hold this case pending disposition of *Johnson* v. *United States*, No. 96-203 (argued Feb. 25, 1997). That suggestion is without merit. The question in *Johnson* is whether, on the facts of that case, the district court's failure to submit the materiality element to the jury in a perjury trial constitutes reversible error. Because the court of appeals here affirmed petitioner's conviction on the ground that the district court had in fact submitted the materiality issue to the jury, *Johnson* has no bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

APRIL 1997

SUPREME COURT, U.S.
FILED
MAY 13 1997
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No. 96-1206

IN THE

Supreme Court of the United States

October Term, 1996

JIMMY D. McGUIRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

*ROBERT B. McDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

JENNIFER P. BURKES
SCANLON, SESSUMS, PARKER
& DALLAS
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, Mississippi 39208
(601) 933-2040

Counsel for Petitioner

*Counsel of Record

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No. 96-1206

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JIMMY D. MCGUIRE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

In opposing the petition for writ of certiorari, the government contends there is no conflict between the en banc Fifth Circuit's decision in the present case and that of the First Circuit in *United States v. DiRico*, 78 F.3d 732 (1st Cir. 1996). Op. Cert. 8 n.5. However, *DiRico* made it clear that not only does this Court's decision in *United States v. Gaudin*, 115 S.Ct. 2310, 2313 (1995) require that the issue of materiality be submitted to the jury, but it also requires that "the trial judge must properly instruct the jury *on the legal definition of materiality*." 78 F.3d at 736 (emphasis added). In the present case, the Fifth Circuit held that the simple fortuitous mention of the word "material" in jury instruction 36, regarding Count 4, was sufficient to meet *Gaudin's* mandate, even though the jury

was never instructed as to the legal definition of materiality. The conflict between the two courts of appeals is clear and should be resolved by this Court. *See also, United States v. Keys*, 95 F.3d 874, 881 (9th Cir. 1996) (en banc) ("the lack of instructional guidance on the meaning of materiality" indicates reversible error under *Gaudin*).

The government notes that the petitioner requested no definition of materiality at trial. Op. Cert. 8. Of course, such a request would have been frivolous at the time of trial because, under governing Fifth Circuit law, materiality was an issue for the trial judge and not the jury. This demonstrates -- contrary to the government's contention, op. cert. 9 -- the relevance of *United States v. Johnson*, No. 96-203 (argued Feb. 25, 1997), presently pending in this Court. *Johnson* deals with the question of the proper resolution of a *Gaudin* error when there was no objection at trial due to then-governing case law in the circuit. This Court's resolution of *Johnson* will amplify the ramifications of *Gaudin*, including issues of whether a *Gaudin* error is a "structural error," *see, Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993), and whether there is any role for "plain error" analysis. Given that, in the present case, there was no jury instruction on the legal definition of materiality, there was no request for such an instruction due to long-standing circuit precedent, and there was no submission to the jury of the issue of materiality save a fortuituous use of the word "material" in jury instruction 36, this Court either should grant certiorari and set the present case for argument or, alternatively, vacate and remand for reconsideration in light of *Johnson*, which will provide needed guidance regarding the scope and treatment of *Gaudin* errors.

The government suggests there is no prejudice from the failure to instruct the jury on the legal definition of materiality. Op. Cert. 8. However, as Judge DeMoss, joined by two other judges, made clear in his dissent from the en banc majority decision, the absence of a definition was quite prejudicial in a

case where the materiality of the purportedly inaccurate statements was subject to serious question:

> McGuire . . . filed a form 8300 and later filed an amended form 8300 which correctly reported his receipt of the correct sum of money paid to him. The rest of the information on these forms would not produce any decision or action by the Internal Revenue Service and a reasonable jury could conclude that any omission or misstatement in the rest of these forms was *not* material to the Internal Revenue Service. All of which emphasizes the importance of the jury being properly instructed as to the definition of materiality and then being properly permitted to decide the ultimate mixed question of fact and law which *Gaudin* so clearly says is the jury's ultimate decision.

Pet. App. 15-16 (emphasis in original).

In its opposition, the government commits the same error as the en banc Fifth Circuit, relying on the fact that jury instruction 36 mentioned the word "material." Op. Cert. 7. In so doing, both the government and the Fifth Circuit ignore not only the absence of an instruction defining the legal meaning of materiality, but also the presence of instruction 20, which informed the jury: "[Y]ou need not consider whether the false statement was a material false statement, even though that language is used in the indictment. *That is not a question for the jury to decide*." Pet. App. 3 (emphasis added).

By isolating and relying upon the use of the word "material" in instruction 36, and by ignoring instruction 20 and the absence of any evidence or argument to the jury regarding materiality because of then-governing Fifth Circuit precedent, the government and the en banc Fifth Circuit commit the same mistake for which this Court often has taken criminal defendants to task:

> It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record.

Estelle v. McGuire, 502 U.S. 62, 72 (1991), *quoting*, *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

> [A] judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instructions of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in conviction.

Cupp v. Naughten, 414 U.S. at 147.

> *Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.* Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 381 (1990) (emphasis added).

In the present case, the jury was told in instruction 20 that materiality "is not a question for the jury to decide." There was no definition of the legal meaning of the word "material." Consistent with governing case law, the parties put on no evidence before the jury regarding materiality and there was no argument by counsel for either side regarding whether the government had met its burden of proof on the materiality

issue.[1] Given this, there is a "reasonable likelihood," *see, Victor v. Nebraska*, 511 U.S. 1, 6 (1994), that the jury believed it was not to decide the issue of materiality regarding *any* of the counts, including the count for which the petitioner was convicted and sent to prison. This danger is not avoided simply by the fortuitious use of the word "material" in instruction 36.[2]

Because the en banc Fifth Circuit's decision so far departs from the recognized principles that "[j]urors do not . . . pars[e] instructions for subtle shades of meaning" and that single instructions "may not be judged in artificial isolation," that decision suggests those principles are to be applied only against criminal defendants and the government is not bound by them. As Judge DeMoss said in his dissent:

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[1] In addition, Count 4 -- the only count for which the petitioner was convicted -- specified a violation of 26 U.S.C. §§ 6051I(f)(1)(B) and 7026(1). Pet. App. 7-8 n.2. The instruction for that count, instruction 36, referenced the requirements of § 6051I(f)(1)(B), but not those of § 7206(1). Pet. App. 3-4. This means, first, that instruction 36 improperly failed to set out all of the elements required for conviction on Count 4, as pointed out by the panel opinion in this case. Pet. App. 41. But it also means that the only reference for the jurors regarding the elements of § 7206(1), which was charged in Count 4, was instruction 20. Instruction 20 related to Count 5, which also charged a § 7206(1) violation. As noted previously, instruction 20 stated that materiality "is not a question for the jury to decide." Pet. App. 3. Because of the allegation of § 7206(1) violations in both Count 4 and Count 5, and because instruction 20 was the only instruction to set out the elements of a § 7206(1) violation, the Count 4 instruction (instruction 36) was inextricably linked to, and infected by, the Count 5 instruction (instruction 20).

[2] *Victor v. Nebraska* cites *Estelle v. McGuire*, 502 U.S. at 72 and n. 4 in support of the "reasonable likelihood" standard, and *Estelle* cites *Boyde v. California*, 494 U.S. at 380. *Boyde* makes it clear that, under this standard, "a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction," but instead must show something more than "a possibility of such an inhibition." *Id.*

> The majority states that the district court did not withhold the element of materiality from the jury but that does not address the issue of whether materiality was properly submitted. If the element of materiality is improperly submitted to the jury that is just as incorrect as not submitting it at all. . . . Interpreting *Gaudin* as defining error only to the extent that the district court expressly withholds materiality from the jury's determination is a stingy and hyper-technical interpretation which is more consistent with a judicial philosophy that says that the primary role of this Court is to sustain a conviction.

Pet. App. 16-17.

The petition should be granted and a writ of certiorari should issue to review the en banc decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

ROBERT B. McDUFF*
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

JENNIFER P. BURKES
SCANLON, SESSUMS,
PARKER & DALLAS
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, Mississippi 39208
(601) 933-2040

Counsel for Petitioner

* Counsel of Record